SUPREME COURT, U. S.

NOV 30 1966

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1966

No. 118

JAMES A. DOMBROWSKI and SOUTHERN CONFERENCE EDUCATIONAL FUND, INC.,

Petitioners,

against

SENATOR JAMES EASTLAND, individually and as Chairman of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate; J. G. SOURWINE, individually and as Committee counsel for the Internal Security Subcommittee of the Judiciary Committee of the United States Senate,

Respondents.

BRIEF FOR PETITIONERS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARTHUR KINOY,
WILLIAM M. KUNSTLER,
511 Fifth Avenue,
New York, New York,

MILTON E. BRENER,
1304 National Bank of
Commerce Building,
New Orleans, Louisiana,

Attorneys for Petitioners.

INDEX TO BRIEF

	PAGE
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Questions Presented	2
Statement of the Case	4
A. Statement of Facts	4
1. The facts preceding the institution of the present complaint for injunctive relief and money damages	4
2. The Institution of the First Action	11
3. The Institution of the Second Action and the Filing of the Present Complaint	15
B. Proceedings Below	16
1. Proceedings in the District Court for the District of Columbia	16
2. Proceedings in the Court of Appeals for the District of Columbia	18
3. Proceedings in the First Action in the Eastern District of Louisiana and in the Court of Appeals for the Fifth Circuit	19
Summary of Argument	22
Point One—The Speech or Debate Clause does not immunize the respondents from liability under the cause of action for money damages	29
1. Legislative immunity is not available to the respondents under the governing decisions of this Court	31
(a) *Tenney* v. *Brandhove* Does Not Sanction the Blanket Immunity Imposed by the Lower Court	31

PAGE

(b) The Opinion in *United States* v. *Johnson* Forecloses Reliance Upon the Speech or Debate Clause As Immunizing Respondents' Conduct 39

(c) No Legislative Immunity Attaches to the Acts of the Respondents Under the Rule of *Kilbourn* v. *Thompson* 47

2. The History of Legislative Privilege and the Decisions of the English Courts Support the Conclusion that Immunity is not Available to the Respondents 52

3. The Solicitor-General Appears to Agree that no Immunity Would Protect Respondents as Parties to the Conspiracy Affecting the October 4 Raids 64

4. The Recent Decisions in the Fifth Circuit in the Louisiana Branch of This Litigation Support the Conclusion That no Immunity Attaches to Respondents as Parties to the Conspiracy to Bring About the October 4 Raids 67

5. Respondents' Unauthorized Use of the Subpoena Power in the Course of the Conspiracy does not Justify the Invocation of the Doctrine of Legislative Immunity 70

Point Two—No doctrine of immunity protects respondent Sourwine from liability under the cause of action for money damages 84

1. Legislative Immunity Is Not Available to respondent Sourwine As An Employee of the Legislature 84

2. No Immunity Attaches to the Actions of Respondent Sourwine Under the Doctrine of *Barr* v. *Matteo* 87

PAGE

Point Three—The lower court was fully justified in concluding that there are in this record disputed issues of fact as to whether respondents were parties to a knowing concert of action with the state officials which would require exploration and resolution by way of a trial 95

Point Four—The equitable relief sought by petitioners was appropriate 106

Conclusion 113

APPENDIX A—Constitutional and Statutory Provisions Relied On 115

APPENDIX B—Judgment 118

APPENDIX C—Order 121

APPENDIX D—Order 123

APPENDIX E—Opinion of Wisdom, *C.J.* 130

APPENDIX F—Affidavit and Attachments of Col. Alexander, staff director of Louisiana Joint Committee, filed in *Dombrowski* v. *Burbank* (E.D. La.) 136

Table of Cases Cited

Alexander Murray's Case, 1 Wils. 299 56
American Tobacco Co. v. United States, 328 U.S. 781 97, 103
Ashby v. White, 2 Ld. Raym. 938 ..... 55, 57, 58

Bargainer v. Michal, 233 F. Supp. 270 (D.C. N.D. Ohio, 1964) 30
Barr v. Matteo, 360 U.S. 564 ..... 3, 19, 27, 87, 88, 90
Basista v. Weir, 340 F. 2d 74 (CA 3, 1965) 30
Bates v. Little Rock, 361 U.S. 516 81
Beauregard v. Wingard, 230 F. Supp. 167 (D.C. 5D Cal. 1964) 30
Bell v. Hood, 327 U.S. 678 ..... 30, 73

PAGE

Berkowitz v. United States, 340 F. 2d 168 (CA 1, 1965) 37
Birnbaum v. Trussell, 347 F. 2d 86 (C.A. 1965) 94
Blackman v. Guerre, 342 U.S. 512 110
Blumenthal v. United States, 332 U.S. 539 .....97, 103
Bock v. Perkins, 139 U.S. 628 30
Boyd v. United States, 116 U.S. 616 37
Brass Crosby's Case, 3 Wils. 199 ..... 55, 56
Brown v. United States, 204 F. 2d 247 (6th Cir. 1953) 42
Bruce Cotton v. United States, 50 F. 2d 257 105
Burdett v. Colman, 14 East 163 57
Bush v. New Orleans, 188 F. Supp. 916 106

Case of Captain Streater, 5 How. St. Tr. 336 56
Chafin v. Pratt, 358 F. 2d 349 (C.A. 5, 1966) 94
Clare, Atty. Gen. v. Verbersee Firanz Korporation, 332 U.S. 480 108
Cohen v. Norris, 303 F. 2d 24 (CA 9, 1962) 30
Commonwealth v. Webster, 5 Cush. (Mass.) 295 105
Cudahy Packing Co. of Louisiana v. Holland, 315 U.S. 357 72
Culp v. United States, 131 F. 2d 93 (8th Cir. 1942) .. 42

Degregory v. Attorney General of New Hampshire, 383 U.S. 825 .....81, 82, 89
Dombrowski v. Burbank, #13,967 (E.D. La.) 6, 11
Dombrowski v. Pfister, 380 U.S. 479 ....4, 7, 8, 9, 22, 30, 41, 83, 106, 109, 112

Earl of Shaftsbury, 1 Modern Repts. 144 56
Entick v. Carrington, 19 How. St. Tr. 1029 (C.P. 1765) 37, 55

Flemington v. Adams, 253 F. Supp. 542 (D.C. Col. 1966) 93
Fletcher v. Peck, 6 Cranch 87 43
Fowler v. Southern Bell Telephone and Telegraph Co., 343 F. 2d 150 (C.A. 4, 1965) 92

PAGE

Garrison v. Louisiana, 379 U.S. 64 50
Giboney v. Empireg Storage & Ice Co., 336 U.S. 490 50
Gibson v. Florida Legislative Committee, 372 U.S. 539 .....81, 98, 111
Glasser v. United States, 315 U.S. 60 .....97, 103
Gojack v. United States, 384 U.S. 702 .....14, 26, 71, 75, 81, 82, 87, 89
Great American Ins. Co. v. Horab, 309 F. 2d 262 .. 105

Haas v. Henkel, 216 U.S. 462 40
Helley v. Dunne, 344 F. 2d 129 (C.A. 1, 1965) 91, 92
Hodges v. Murray, 240 Ky. 127 105
Hogue v. CIO, 307 U.S. 496 106
Howard v. Lyons, 360 U.S. 593 91
Hughes v. Johnson, 305 F. 2d 67 (C.A. 9, 1962) 30, 91
Hynes v. Grimes Packing Co., 337 U.S. 86 110

Jordan v. Hutchinson, 323 F. 2d 597 106

Kilborn v. Thompson, 103 U.S. 168 .. 24, 27, 31, 36, 43, 44, 47, 48, 49, 50, 51, 52, 60, 84, 85, 86, 87, 88, 106

Lark's Case, 1 Hats. Pr. 18 57
Lee v. Hodges, 321 F. 2d 480 (CA 4, 1963) 30
Liveright v. United States, 347 F.2d 473 (C.A. D.C 1965) 72, 73
Long v. Ansell, 293 U.S. 76 (1934) 62
Louisiana v. NAACP, 366 U.S. 293 .....16, 42, 81, 98, 111
Lovell v. Griffin, 303 U.S. 444 49

Mapp v. Ohio, 367 U.S. 643 .....9, 37, 42, 99
Marbury v. Madison, 1 Cranch 137 .....30, 69, 84, 113
Marshall v. Gordon, 243 U.S. 521 36
McGovern v. Mortz, 182 F. Supp. 343 (DC DC 1960) 62
McGrain v. Daugherty, 273 U.S. 135 36
Miranda v. Arizona, 384 U.S. 436 69
Monroe v. Pape, 365 U.S. 171 .....30, 32, 94
Mr. Coke's Servant, 1 Hats. Pr. 112 57

PAGE

NAACP v. Alabama, 357 U.S. 449 ..... 16, 81, 98, 111
NAACP v. Button, 371 U.S. 415 111
NAACP v. Flowers, 377 U.S. 288 ..... 16, 42, 111
National Screen Service Corp. v. Poster Exchange, Inc., 5 Cir. 1962, 305 F.2d 647 68
Near v. Minnesota, 238 U.S. 691 49
Nesmith v. Alford, 318 F. 2d 110 (LA 5, 1963) 30
New York Times Co. v. Sullivan, 376 U.S. 254 ..... 46, 49
New York Trust Co. v. Eisner, 256 U.S. 345 52
Norton v. McShane, 332 F. 2d 855 94

Olmstead v. United States, 277 U.S. 438 93

Pereira v. United States, 347 U.S. 1 97
Pfister v. Areneaux #22562, Court of Appeals for the Fifth Circuit 21, 25, 37, 39, 67, 69, 70, 71
Pierson v. Ray, 332 F. 2d 213 (C.A. 5, 1965) cert. granted—U.S.—#79 and 94, October Term, 1966.. 94
Poller v. Columbia Broadcasting System, 368 U.S. 464 ..... 68, 97, 102
Polk v. Missouri-Kansas-Texas R. Co., 351 Mo. 865 105

Regina v. Paty, 2 Ld. Raym. 1105 ..... 55, 56, 58
Rex v. Creevy, 1 M. & S. 273 62
Russell v. United States, 369 U.S. 749 81

Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 .. 97, 103
Schneck v. United States, 249 U.S. 471 49
Shelton v. United States, 327 F.2d 601 (C.A. D.C. 1963) 72, 73, 75
Shirley and Fagg, 6 How. St. Tr. 1162 56
Sir Robert Pyle's Case, 5 How. St. Tr. 948 ..... 55, 56
Stockdale v. Hansard, 9 A.D. § E.1 ..... 25, 31, 59, 60, 61, 62, 63, 83
Sweezy v. New Hampshire, 354 U.S. 234 80

PAGE

Tenney v. Brandhove, 341 U.S. 367 ....19, 20, 21, 23, 24, 31, 32, 33, 34, 35, 37, 38, 39, 43, 44, 47, 48, 50, 51, 52, 60, 64, 67, 73, 79, 81, 82, 85
The Sam Sloan, 65 F. 175 105
Thomas v. Collins, 323 U.S. 516 49
Thornhill v. Alabama, 310 U.S. 88 49

United Mine Workers v. Gibbs, 86 S. Ct. 1130 105
United States v. Bausch & Lomb, 321 U.S. 707 104
United States v. Continental Oil Co., 337 U.S. 161 .. 97
United States v. General Motor Corp., 86 S. Ct. 1321..28, 104
United States v. Guest, 383 U.S. 745 ..... 41, 42
United States v. Johnson, 383 U.S. 169 .. 23, 31, 33, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50, 51, 52, 53, 54, 66, 82, 83, 88, 89, 90
United States v. Lamont, 18 F.R.D. 32 81
United States v. Parke Davis Co., 362 U.S. 29 104
United States v. Price, 383 U.S. 787.....41, 42, 73
United States v. Ramey, 336 F. 2d 512 (4th Cir. 1964) cert. den. 379 U.S. 972 42
United States v. Rumley, 345 U.S. 41 .....14, 75, 80

Valentine v. Chrestenson, 316 U.S. 52 50
Virginia Ry. v. System Federation, No. 40,300 U.S. 515 .....29, 109, 110

Watkins v. United States, 354 U.S. 178 .....26, 54, 79, 80, 82, 89, 106, 107
Weeks v. United States, 232 U.S. 383 37
Wheeldin v. Wheeler, 373 U.S. 647 .....26, 27, 30, 67, 70, 71, 72, 73, 89
Whitney v. California, 274 U.S. 357 46
Williams v. Fanning, 332 U.S. 490 110

Yellin v. United States, 374 U.S. 109 ..... 72, 81

Statutes

PAGE

18 U.S.C. §§ 241, 242 ..... 41, 90

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 ..... 2,41, 90, 94, 109

42 U.S.C. § 1985 ..... 2, 41, 90, 94

Constitutional Provisions

Article I § 6 ..... 2, 29, 40, 43

First Amendment 2, 3, 15, 28, 46, 82, 83, 89, 98, 107

Fourth Amendment 2, 15, 22, 25, 28, 31, 32, 38, 41, 44, 50, 67, 68, 69, 70, 73, 87, 90, 94, 99, 113

Fourteenth Amendment 2, 3, 15, 28, 41, 42 46, 83, 94, 97, 99

Other Authorities Cited

Goldfarb, *The Contempt Power* (Col. Univ. Press 1963) 85

Neale, *The Commons' Privilege of Free Speech in Parliament* (Seton-Watson ed. 1924) 53

Note, *The Doctrine of Official Immunity Under the Civil Rights Act,* 68 Harvard Law Review 1229 (1955) 93

Note, 44 Texas Law Review 570 (1966) 91

Prynne, *Brief Register,* IV, 695 57

Taswell-Longmead, *English Constitutional History* (11th ed. Plucknett, 1960) 53

Wittke, *The History of English Parliamentary Privilege* (Ohio State Univ. Studies, 1921) .53, 54, 55, 56, 57, 58, 59, 62, 63

Supreme Court of the United States

October Term, 1966

No. 118

JAMES A. DOMBROWSKI and SOUTHERN CONFERENCE EDUCATIONAL FUND, INC.,

Petitioners,

against

SENATOR JAMES EASTLAND, individually and as Chairman of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate; J. G. SOURWINE, individually and as Committee counsel for the Internal Security Subcommittee of the Judiciary Committee of the United States Senate,

Respondents.

BRIEF FOR PETITIONERS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Opinions Below

The Court of Appeals for the District of Columbia Circuit affirmed the orders of the District Court in a *per curiam* opinion in which only two Circuit Judges joined. (Circuit Judges Burger and McGowan joined in the opinion. Senior Circuit Judge Washington did not participate in the decision.) The *per curiam* opinion is reported at 358 F. 2d 821 (App. D. C. 1966) (R. 100-109).

The District Court opinion by District Judge Holtzoff, dismissing so much of the complaint as sought injunctive relief, is not yet reported (R. 12-14). No opinion was filed by District Judge Sirica in granting respondents' motion for summary judgment in the cause of action for money damages.

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on February 4, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). A petition for writ of certiorari was filed with this Court on May 5, 1966, and an order allowing certiorari was entered by the Court on October 10, 1966.

Constitutional and Statutory Provisions Involved

The principal constitutional and statutory provisions involved are the First, Fourth and Fourteenth Amendments to the Constitution of the United States, Article I, Section 6 of the Constitution of the United States (the "speech or debate" clause), and Title 42 U.S.C. 1983 and 1985. The relevant portions of these provisions are set forth in Appendix A to this Brief.

Questions Presented

1. Whether the Speech or Debate Clause immunizes a Senator and a Senate employee from liability in a suit for money damages under the Civil Rights Act where the complaint charges that they participated in a conspiracy together with officials of the State of Louisiana under color of unconstitutional laws of that state to instigate and contrive illegal raids, arrests, searches and seizures, in violation of the Fourth Amendment, for the purpose of

intimidating and deterring citizens from exercising fundamental First Amendment rights of speech, press and association in their efforts to implement the Fourteenth Amendment guarantees of Negro equality and freedom?

2. Whether summary judgment for such respondents is proper in a cause of action for money damages under the Civil Rights Act where the lower court concedes that in the record there are disputed issues of fact as to whether the respondents were parties to a knowing concert of action with the state officials requiring exploration and resolution by means of a trial?

3. Whether the judicially developed doctrine of official immunity enunciated by the Court in *Barr* v. *Matteo* may be extended to cover legislative employees?

4. Whether if so, such a doctrine immunizes an employee of the legislature from a suit for money damages under the Civil Rights Act where the complaint charges that he participated in a conspiracy together with officials of the State of Louisiana, under color of unconstitutional laws of that State, to instigate and contrive illegal raids, arrests, searches and seizures, in violation of the Fourth Amendment, for the purpose of intimidating and deterring citizens from exercising fundamental First Amendment rights of speech, press and association in their efforts to implement the Fourteenth Amendment guarantees of Negro equality and freedom?

5. Whether the request for equitable relief restraining the individual respondents from using or disposing of the records illegally obtained by them as a result of their participation in the charged conspiracy should have been dismissed without a hearing on the unilateral assertion of respondents that it would be futile for the court to grant the relief sought?

Statement of the Case

The writ of certiorari brings up for review a judgment and *per curiam* opinion of the Court of Appeals for the District of Columbia Circuit affirming (1) an order of the District Court dismissing petitioners' cause of action for equitable relief and (2) an order of the District Court granting respondents' motion for summary judgment as to petitioners' cause of action for money damages.

A. Statement of Facts

1. The facts preceding the institution of the present complaint for injunctive relief and money damages.

The case brings to the Court questions arising out of the same factual context of illegal arrests and raids undertaken under color of certain Louisiana state statutes which were the occasion of the Court's examination in the October 1964 Term in *Dombrowski* v. *Pfister,* 380 US 479.

The petitioners here, Dr. James A. Dombrowski and the Southern Conference Educational Fund, Inc., were the successful appellants in *Dombrowski* v. *Pfister, supra.*

Petitioner Southern Conference Educational Fund, Inc., hereafter referred to as "SCEF", is a non-profit membership corporation organized under the laws of the State of Tennessee and maintains an office in the State of Louisiana (R. 2). The purpose and function of SCEF as an association, as alleged in the complaint, is to attempt to secure to Negro citizens the rights guaranteed to them under the federal Constitution and to participate in efforts to end all forms of segregation in the Southern states (R. 2). See *Dombrowski* v. *Pfister, supra,* at p. 482. Petitioner Dr. James A. Dombrowski was then the Executive Director of SCEF and was a citizen of the State of Louisiana and the United States (R. 2, 20).

Respondent Eastland is a Senator from the State of Mississippi and the Chairman of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate. Respondent Sourwine is the Chief Counsel of the Internal Security Subcommittee of the Senate (R. 3).

During the summer and early fall of 1963, just prior to the October raids, certain private discussions were held between respondent Sourwine and one Jack N. Rogers, who was counsel to the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature, concerning the records and files of petitioner SCEF.[1] It appears that on or about July 17, 1963 respondent Sourwine had a meeting with Rogers at which Rogers informed the respondent that the Louisiana Committee was contemplating obtaining the records and files of SCEF. Rogers told Sourwine that he would let him know promptly if they did obtain the records, and if they seemed of interest to the respondent (Rogers Affidavit, R. 71, Sourwine Affidavit, R. 40). About "the middle of September" 1963 (R. 71), another private discussion about the SCEF records was held between respondents Sourwine and Rogers. Rogers telephoned respondent Sourwine and asked him whether, if the Joint Committee obtained the records, the respondent and one Mandel, another employee of the Senate Committee, could come down to Louisiana and help "evaluate the

[1] All of the facts set forth here as facts are uncontested. They are taken in large measure, as indicated, from respondents' own affidavits or depositions or from relevant court opinions and findings. The Court of Appeals rejected respondents' contention that petitioners had failed to put forward a serious claim that respondents were parties to a knowing concert of action with the state officials holding that "were only the former involved we might have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial" (R. 105). However the Court of Appeals based its affirmance of the summary judgment order solely on the finding that the doctrine of legislative immunity insulated both respondents from suit (R. 105).

material'' (Rogers Affidavit, R. 71, Sourwine Affidavit, R. 40).[2] Respondent Sourwine then discussed the content of his mid-September talk with respondent Eastland (Sourwine Affidavit, R. 40).

Respondents' own proof next shows that sometime either before or after the mid-September discussion with respondent Sourwine, but in any event prior to September 20, it was concluded that the method of seizure of the SCEF records ought to be through the utilization of the criminal provisions of the Louisiana anti-subversive laws rather than by direct subpoena by the Louisiana Legislative Committee (Rogers Affidavit, R. 71).[3] Accordingly, Rogers

---

[2] Respondent Sourwine places the second discussion about the SCEF records "sometime later, in August or September, 1963" (R. 40). Rogers places it "about the middle of September, 1963" (R. 71).

[3] Actually, the companion litigation in the Louisiana federal courts, *Dombrowski* v. *Burbank*, see *infra*, at p. 11, has revealed that Rogers and the Louisiana Joint Committee first developed the plan to utilize the police procedures to undertake the raids and seizures as early as August 27th, several weeks *before* the "mid-September" conference of Rogers and respondent Sourwine. Thus Colonel Alexander, the staff director of the Joint Committee, stated as follows in an affidavit submitted in the Louisiana federal action:

> "On August 27, 1963, at a full meeting of the Committee, Affiant briefed the Committee completely on the progress of the investigation which had begun and which had been named 'Operation Tip-Top'. At this Committee meeting Affiant was authorized by the Committee to contact officials of the New Orleans Police Department and fully brief them and to enlist their assistance."

The Alexander affidavit affixed a copy of the "official minutes" of the Committee meeting. These minutes of the August 27, 1963, meeting stated, in part:

> "Col. Alexander briefed the Committee completely on the progress to date of Operation Tip-Top and asked the Committee's permission to brief Chief of Police Giarrusso of New Orleans and Major Trosclair of the New Orleans Police Department on the operation with the intention of enlisting their assistance since the operation would fall under the jurisdiction of the New Orleans Police force."

The Alexander affidavit and attachments are in the court files in *Dombrowski* v. *Burbank* and are reproduced here at Appendix F

advised the Joint Committee that the operations of petitioner SCEF "were in violation of the Louisiana criminal statutes dealing with subversive activities" (R. 71). The Joint Committee concurred in this and "directed" Rogers to "take the matter up with the Louisiana State Police" (R. 71). On or about September 20, 1963, Rogers met with the Louisiana Superintendent of Police and "requested that he have the State Police obtain and execute search warrants for the offices of the SCEF and the premises occupied by James A. Dombrowski and certain other officers of the SCEF" (Rogers Affidavit, R. 72). Rogers testified in his affidavit that "I offered to assist the police in obtaining the warrants, and my offer was accepted" (R. 72). On October 2, 1963, Rogers and a Louisiana police officer swore to applications for search warrants and arrest warrants under the Louisiana "anti-subversive" statutes, and the warrants were issued (R. 72).

On the afternoon of October 4, 1963, certain police officials of the Police Department of the City of New Orleans, Louisiana, officers of the Louisiana State Police and Mr. Rogers, representing the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature, broke into and forcibly entered the office of SCEF in the City of New Orleans and proceeded to seize the entire contents of the office including the books and records of the organization, its ledgers, receipts, memoranda, membership lists, lists of contributors, vouchers, pamphlets and literature, together with many items of personal property belonging to Dr. Dombrowski. The office was totally ransacked and everything movable taken out (R. 4, 5, 21, 23, 24, 25). Dr. Dombrowski was placed under arrest and booked for violation of Louisiana Revised Statutes 14:358 et seq. and 14:390 et seq., known as the Louisiana Anti-Subversive Laws (R. 19).[4] The same day officers of the

[4] The provisions of the Louisiana law under which Dr. Dombrowski was arrested were later stricken as facially unconstitutional by this Court in *Dombrowski* v. *Pfister, supra.*

New Orleans Police Department of the State Police and Mr. Rogers, again representing the Louisiana Joint Legislative Committee, proceeded to search the residence of Dr. Dombrowski in the City of New Orleans and seized many items of personal property from his house and from his automobile located nearby (R. 22).

The circumstances of the arrests and raids were detailed by this Court in the *Dombrowski* opinion. In footnote four, 380 US 479 at 480, the Court stated that the circumstances of the arrests were set forth in this descriptive passage from Judge Wisdom's dissenting opinion in the three-judge court, 227 F. Supp. at 573:

> "At gunpoint their homes and offices were raided and ransacked by police officers and trustees from the House of Detention acting under the direct supervision of the staff director and the counsel for the State Un-American Activities Committee. The home and office of the director of the Southern Conference Educational Fund were also raided. Among the dangerous articles removed was Thoreau's *Journal*. A truckload of files, membership lists, subscription lists to SCEF's newspaper, correspondence, and records were removed from SCEF's office, destroying its capacity to function. At the time of the arrests, Mr. Pfister, Chairman of the Committee, announced to the press that the raids and arrest resulted from 'racial agitation.'"

The raids of October 4 and the arrest of Dr. Dombrowski were conducted purportedly under the authority of the search warrants and arrest warrants sworn out on October 2. However, at a preliminary hearing held on October 25, a judge of the Criminal District Court for the Parish of Orleans, after taking evidence, summarily discharged the defendants. The state judge held that the arrest warrants were improvidently isued and that there was no reasonable cause for the arrests (R. 19, 20). Moreover, at a later stage in the state criminal proceedings, the

state court granted a motion to suppress the seized evidence on the ground that the raids were illegal, in violation of the Federal Constitution, relying upon this Court's decision in *Mapp* v. *Ohio*, 367 US 643.[5] (The opinion of the state court granting the motion to suppress is set forth in Appendix B.) Consequently, under rulings of the Louisiana state courts both the arrests and the raids were wholly illegal. As this Court pointed out in *Dombrowski*, "Later in October a state judge quashed the arrest warrants as not based on probable cause, and discharged the appellants. Subsequently, the court granted a motion to suppress the seized evidence on the ground that the raid was illegal." 380 US at p. 488.[6]

However, despite the ruling of the state court on October 25, that the arrest warrants were illegal and issued without probable cause, the books, records, documents, membership lists and other articles which had been seized during the illegal raids were not then returned to the petitioners. They had been secretly and without petitioners' knowledge, transferred from the control of the police to the possession of respondents Sourwine and Eastland.

Although none of these facts were known at the time either to petitioners or the public, what had happened to the records during the illegal raids of October 4, emerged during the subsequent litigation.

At the time of the seizure of the records by the police on October 4, Rogers then and there served on the police

---

[5] The motion to suppress was made after indictments were returned following the dissolution of Judge Wisdom's temporary restraining order by the majority of the three-judge court. See 380 US at 484.

[6] The illegality of the raids was further underscored by the decision of this Court in *Dombrowski* directing that on remand the decree of the three-judge court shall include an order directing the "immediate return of all papers and documents seized." 380 US at p. 497.

officer in charge, a Major Willie, a Joint-Committee subpoena duces tecum requiring "forthwith" production of everything seized by the police (Rogers Affidavit, R. 72). The seized materials, however, remained in possession of the state police who took them that evening to Baton Rouge (R. 72). At 10:30 P. M. that evening, October 4, Rogers then telephoned respondent Sourwine at his Washington home and informed him of the seizures of the SCEF records. Rogers told Sourwine that the Louisiana State Committee had obtained "all of the records and files" of SCEF (R. 48), and urged him to come down to Louisiana "as soon as possible" (Rogers Affidavit, R. 73, Sourwine Affidavit, R. 40). Respondent Sourwine left Washington at 8:20 A. M. and appeared in Baton Rouge at 11:00 A. M. (Sourwine Affidavit, R. 41). He had in his possession several blank subpoenas signed by respondent Eastland (R. 32). Apparently respondent Sourwine had access to a "folder which contains a number of subpoenas signed by the Senator in blank" (R. 32). After discussing the nature of the seized materials with Rogers (R. 41), Sourwine had a telephone conversation with respondent Eastland (R. 41). He then had the blank subpoenas filled out in Baton Rouge by a typist who was Mr. Rogers' secretary (R. 32) [7] and served them on Rogers the same morning. Although the respondents maintain that the blank subpoenas were filled in on the morning of October 5, the subpoenas on their face were dated October 4, the day of the raids (R. 32, 33).[8] The superintendent of the Louisiana Police was then "appointed" on the same day "custodian" of these records and documents by respondent Sourwine (R. 41). However, the physical location of the records and other material remained in Baton Rouge physically under the control of the state officials (R. 72).

Respondent Sourwine later testified that the issuance of the blank subpoenas dated October 4 was never authorized

---

[7] These facts come from the pre-trial deposition of respondent Sourwine, excerpts of which are in the printed record.

[8] The respondents maintain that this was a "stenographic error" (R. 33, R. 41).

by the Internal Security Subcommittee of the Senate, and that these subpoenas were not authorized by either the Committee or the Subcommittee (R. 34). The respondents have conceded in this Court that these subpoenas were not authorized by either the Committee or the Subcommittee. Respondents' Brief in Opposition to Petition for Writ of Certiorari, p. 8.

2. The Institution of the First Action.

These relations between the respondents and the Louisiana officials on the evening of the raids and the next morning were wholly unknown to the petitioners until the day of the preliminary hearing in the state court on October 25, when the Louisiana officials informed the state court that they could not comply with any order to return the documents and membership lists seized during the illegal arrests since they were technically in the custody of the respondents Sourwine and Eastland although physically still in the possession of state officials (R. 28). Until that moment respondents' participation in the events of October 4 and 5 had been completely unknown to petitioners or to the press or public.

Immediately after the ruling of the state court on October 25, voiding the warrants of arrest and upon the disclosure of respondents' role in the seizure of the records, petitioners instituted in the United States District Court for the Eastern District of Louisiana, New Orleans Division, a federal plenary action under the Civil Rights Act and the Constitution, seeking injunctive relief and money damages. The action is referred to hereafter as the first action.[9]

Petitioners joined, as defendants in the first action, the Louisiana state officials involved in the raids together with respondent Eastland, charging a conspiracy under the color of Louisiana state law to deprive petitioner of

---

[9] This action was entitled *Dombrowski* v. *Burbank*, #13,967, in the Eastern District of Louisiana, New Orleans Division.

rights, privileges and immunities granted to them as citizens of the United States by the laws and Constitution of the United States. The complaint was filed on the morning of October 27 (R. 29). A motion for a temporary restraining order restraining the defendants from removing any of the seized documents, records and other articles from their location in Baton Rouge, and from delivering them, or surrendering them in any way to respondent Eastland, was immediately presented to Federal District Judge Ainsworth (now Circuit Judge) (R. 29). Petitioners were notified by the Clerk of the Court that Judge Ainsworth had been assured by representatives of the State that the seized material was still at the State Police Headquarters in Baton Rouge (R. 29). Judge Ainsworth accordingly directed that the motion be returnable before him Monday morning, October 28, in New Orleans and ordered petitioners to notify the defendants in the action that the restraining order would be heard in the District Court that Monday morning (R. 29). Accordingly, petitioners sent respondent Eastland the following telegram (R. 29):

> "Federal Judge Robert Ainsworth has requested your presence in his office 9:30 A. M., October 28th, to discuss an injunction enjoining turning over SCEF and Smith and Waltzer records to Senator Eastland." (R. 54)

What followed that evening is unchallenged on the record.

The uncontested facts are that on Sunday evening, October 28, respondent Eastland notified respondent Sourwine by telephone of the receipt of this telegram and directed respondent Sourwine to telephone Baton Rouge at once and arrange to have all the records, documents, membership lists and other materials transferred that night out of the State of Louisiana (R. 55).

When it appeared that hiring a truck might be difficult at that time of night, respondent Eastland told Sourwine to "get them started" (R. 55), and "get them over to Woodville [Mississippi], and, if necessary, you can leave them with the Chancery Clerk there, and then have the

Committee boys pick them up and take them on from there" (R. 55). This was already "fairly late in the evening" (R. 56).

At about 10 P.M. Sourwine telephoned Rogers and told him he had been trying unsuccessfully to reach Colonel Burbank, the Superintendent of the Louisiana Police, and asked Rogers to give Burbank Senator Eastland's instructions to move all the SCEF material that night out of Louisiana and over to Woodville, Mississippi (R. 73-74). Rogers then immediately conveyed Senator Eastland's instructions to Colonel Burbank (R. 74). At 11:43 P.M. respondent Sourwine confirmed these instructions to immediately transport the SCEF material to Woodville, Mississippi, in a telegram he dictated over the telephone to Colonel Burbank (R. 56).

As a result of these directions of the respondents, at about midnight Sunday night a vanload of material containing the SCEF records and documents was moved over the Louisiana state border to Woodville, Mississippi, and was deposited with the clerk of the Chancery Court in Woodville, Mississippi (R. 29, 58).[10] This midnight removal

---

[10] Respondent Sourwine offered an interesting suggestion in his deposition as to certain of the possible reasons for the sudden removal of the seized SCEF records from the State of Louisiana late that Sunday night.

> "Q. Was it your understanding that there was any connection between the request for injunction and the sudden removal of the documents from the State of Louisiana? A. I did not know about a request for an injunction, sir, but certainly I had in my mind—and I imagine Senator Eastland had in his mind—the fact that if there was to be litigation about the documents, nobody should be dragged into it and involved in it except the Committee and the Committee personnel, and that the documents should be taken out of the possession of a custodian who held an official position with the State and might, because he wore [fol. 63] two hats, one as head of the State Police and one as custodian for us, become involved in an awkward situation.
>
> "Now I did not discuss this with Senator Eastland, but I admit that I did have that possibility in mind." (R. 57)

of the SCEF records out of Louisiana into Mississippi was not authorized by or in fact known to the other members of the Senate Subcommittee (R. 57), and the respondents have conceded in this Court that the "removal of that property [petitioners' seized records] from Louisiana to Washington —had not been authorized by the Subcommittee prior to the actions taken by respondents." Respondents' Brief in Opposition to Petition for Writ of Certiorari, p. 8.[11]

On Monday morning, October 28, the return day of the motion for a temporary restraining order, petitioners' attorneys were advised that the defendants could not appear at 9:00 A. M. before Judge Ainsworth as originally scheduled (R. 29). At 12:00 noon attorneys for the Louisiana defendants in the first action appeared in the office of Judge Ainsworth and informed the court and petitioners' attorneys that since all of the records and materials seized in the raids had been removed from the State of Louisiana and had been delivered to the Chancery Clerk in Woodville, Mississippi, the records were no longer in the jurisdiction of the Federal District Court and the request for temporary restraining order was moot (R. 29).[12]

---

[11] While the respondents concede in this Court that the "subpoena directed to petitioners' property—and the removal of that property from Louisiana to Washington—had not been authorized by the Subcommittee prior to the actions taken by respondents" Brief of Respondents, *supra*, at p. 8, they point to a subsequent resolution of the Subcommittee on November 14, 1963, "incorporating the seized records into its hearing record", *supra* at p. 8. The resolution of November 14, does not purport on its face to retroactively authorize either the subpoenas or the sudden midnight removal of the seized materials. See Resolution of November 14 (R. 36). Nor would any such retroactive authorization be effective. *Cf. Gojack* v. *United States*, 384 US 702, 86 S. Ct. 1689, 1697, fn. 12; *United States* v. *Rumley*, 345 US 41, 48. See discussion *infra* at pp. 74 *et seq.* See also Senator Keating's objection to the November 14 Resolution itself (R. 30-31).

[12] The first action has continued in active litigation in the Eastern District of Louisiana in respect to the cause of action for money damages. See discussion *infra* at p. 19.

3. The Institution of the Second Action and the Filing of the Present Complaint.

Immediately thereafter petitioners filed the present complaint in the United States District Court for the District of Columbia, the residence of respondents Sourwine and Eastland.

The present complaint (R. 2-12) paralleled almost identically the basic allegations of the complaint filed in the Eastern District of Louisiana in the first action. The present complaint alleged that the defendants, Thomas D. Burbank, Russell R. Willie, James H. Pfister, all Louisiana state officials, and respondents Eastland and Sourwine, entered into a plan, agreement and conspiracy, under the color of Louisiana state laws and statutes, to deprive the petitioners of rights, privileges and immunities granted to them as citizens of the United States under the laws and Constitution of the United States and in particular the First, Fourth and Fourteenth Amendments (R. 4). The complaint alleged that pursuant to this conspiracy the defendants, under the color of certain Louisiana state statutes, planned and carried through illegal raids of the petitioners' homes and offices, as well as causing the illegal arrest of petitioner Dombrowski, all in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States (R. 5, 6, 7).

The complaint further alleged that the defendants conspired, under the color of the Louisiana state statutes, through these illegal raids, to seize books, records, lists of members, contributors and friends of petitioner SCEF who were engaged in efforts throughout the state of the South to implement the Equal Protection Clause of the Fourteenth Amendment (R. 9). The complaint further alleged that these activities of the defendants were for the purpose of harassing, intimidating and deterring the petitioners, their friends, members and supporters from exercising federally-protected constitutional rights (R. 9). The complaint further alleged that the illegal actions of the

defendants, under color of the Louisiana state statutes, has resulted in serious damage to the plaintiffs (R. 9).

The complaint further alleged that one of the central purposes of the conspiracy was to obtain possession of the membership lists of the petitioner SCEF, a civil rights organization (R. 7).[13] The complaint charged that the respondents, together with the Louisiana state officials, sought to utilize the Louisiana laws as a pretext for the illegal raids and seizures in order to obtain the lists, which they could not have otherwise obtained through lawful legislative process (R. 9).

The complaint sought money damages in the amount of $250,000 for each plaintiff (R. 11) as well as appropriate injunctive relief (R. 10, 11).

B. Proceedings Below

1. Proceedings in the District Court for the District of Columbia.

After the filing and serving of the complaint upon those defendants who were Washington, D. C. residents, respondents Eastland and Sourwine,[14] a motion for a preliminary injunction came before the District Court for the District of Columbia on December 18, 1963 (R. 34). Although petitioners sought to withdraw the motion temporarily in order to take the deposition of a respondent in support of the request for injunctive relief (R. 12; 13), the District Court, by Judge Holtzoff, entered an order from the bench dismissing

---

[13] Since the decision of this Court in *NAACP* v. *Alabama*, 357 US 449, it has become increasingly clear that the enforced production of membership lists of organizations actively seeking enforcement of the Equal Protection Clause in the Southern states itself violates the Constitution, 357 US at p. 462; see also *NAACP* v. *Flowers*, 377 US 288; *Louisiana* v. *NAACP*, 366 US 293.

[14] Service was never effected in this action upon the Louisiana defendants. Similarly, service was not effected upon Eastland as a defendant in the first action in the Eastern District of Louisiana.

so much of petitioners' complaint as sought injunctive relief against the defendants (R. 14, 15). Judge Holtzoff delivered an oral opinion in support of his conclusions that the granting of injunctive relief would "contravene the constitutional requirement of separation of powers and would exceed the jurisdiction of this Court" (R. 15). Notice of appeal was duly filed from this order. The order of Judge Holtzoff left undisturbed so much of the complaint as set forth a cause of action for money damages against respondents.

Pursuant to the Federal Rules of Civil Procedure a deposition of respondent Sourwine was taken by petitioners. Subsequent to this, a deposition of Walter Dillon, Esq., one of the attorneys for the petitioners, was taken by the respondents. Both of these depositions are part of the files of the case. Portions of the deposition of respondent Sourwine are printed as part of the Record in this Court (R. 32-34, 44-60).

Immediately subsequent to the taking of these depositions, respondents moved to dismiss the complaint, or in the alternative, for summary judgment (R. 15-17). Identical motions were made in the first action in the Federal District Court in Louisiana by the Louisiana state defendants. Affidavits were filed in both actions in support of the motion and in opposition.[15]

On March 12, 1964, the District of Columbia District Court, by Judge Sirica, granted the motion for summary

---

[15] Subsequent to the filing of these affidavits but prior to the hearing on respondents' motion, petitioners filed affidavits of counsel seeking to invoke Rule 56, Subdivision (f) of the Federal Rules of Civil Procedure, which would permit the Court on a motion for summary judgment to grant a continuance "to permit affidavits to be obtained or depositions to be taken or discovery to be had" (R. 30-31). These affidavits of counsel set forth certain questions of fact which were discovered after respondents' motion, which indicated the existence of additional serious and sharply disputed material issues of fact which would have required the denial of a motion for summary judgment. See discussion, *infra*, at p. 74.

judgment in respect to the cause of action for damages (R. 17). No opinion was filed. A notice of appeal was duly filed from the order of the District Court granting summary judgment (R. 17-18). A subsequent order of the Court of Appeals consolidated the appeals from the first order dismissing the complaint insofar as it prayed for injunctive relief and the second order granting summary judgment on the cause of action for damages.

2. Proceedings in the Court of Appeals for the District of Columbia.

The Court of Appeals, in a *per curiam* opinion in which the Senior Circuit Judge Washington did not participate, affirmed the orders of the District Court.

In respect to the dismissal of the request for injunctive relief, the Court held that the relief sought was properly denied on the limited ground that an equitable decree against respondents Eastland and Sourwine restraining their use of the illegally seized material and requiring its return would not be effective or of any benefit to petitioners since the seized materials appeared to be in the possession of the Subcommittee itself (R. 104-105).

In respect to the cause of action for money damages, the respondents had urged two positions in the Court of Appeals: "(1) that appellants [petitioners] failed to put forward a serious claim that appellees [respondents] were parties to a knowing concert of action with the state officials, and (2) in any event the doctrine of legislative immunity insulated both appellees [respondents] from suit." (See *per curiam* opinion of Court of Appeals, R. 105). The Court of Appeals, rejecting the first contention, pointed out that "were only the former involved we might have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial." (R. 105). However, the Court of Appeals based its affirmance solely upon an assumption that nevertheless the doctrine of legislative immunity

wholly insulates the respondents from this damage action, resting upon this Court's decisions in *Tenney* v. *Brandhove,* 341 U. S. 367 (1951); *Barr* v. *Matteo,* 360 U. S. 564 (1959).

3. Proceedings in the First Action in the Eastern District of Louisiana and in the Court of Appeals for the Fifth Circuit.

Simultaneous with the motion made in this action in the District Court, the Louisiana state officials, defendants in the first action, made identical motions on identical grounds, before District Judge Ainsworth in the Eastern District of Louisiana. On March 18, 1964, Judge Ainsworth denied such a motion of James Pfister, a member of the Louisiana legislature, and the Chairman of the Joint Legislative Committee, for summary judgment in the cause of action for money damages. Pfister had urged, in identical terms as respondents here, that he was entitled to absolute legislative immunity under the doctrine of this Court in *Tenney* v. *Brandhove, supra.* Judge Ainsworth denied Chairman Pfister's motion for summary judgment holding that "there is a sharp dispute as to the facts upon which we can conclude whether or not the defendant was engaged in permissible legislative activity on the dates he is alleged to have committed tortious acts against plaintiff." (This opinion is set forth in Appendix C.) Accordingly, Judge Ainsworth concluded that the opinion of this Court in *Tenney* did not require summary dismissal of the cause of action for money damages.[16]

In March, 1965, Chairman Pfister renewed his motions for summary judgment or for dismissal, and moved in the alternative for an order as authorized by 28 U.S.C. 1292(b)

---

[16] In a companion opinion on the same day a similar motion for summary judgment made by another state official, Major Willie, was denied by Judge Ainsworth. A motion by the Superintendent of State Police Burbank for summary judgment was granted, not on immunity grounds, but for failure to present a sufficient case of connection with the charged conspiracy.

to appeal the District Court's denial of his motions to the Court of Appeals. On March 18, 1965, Judge Ainsworth, in a careful opinion, reaffirmed his refusal to grant the motions. The opinion, reproduced here as Appendix D, restated the former conclusion of the District Court—that the illegal acts charged against Chairman Pfister do not necessarily receive an automatic blanket immunity under this Court's decision in *Tenney*.

Judge Ainsworth pointed out that the legal issue as to whether the complained of acts of the defendant were within "the sphere of legitimate legislative activity", *Tenney* v. *Brandhove, supra,* at p. 376, turned upon the defendant's relationship to the tortious acts involved in the illegal raids and seizure. Since this question of Chairman Pfister's relationship to the charged conspiracy to undertake the illegal raids and seizures was disputed on the record and could not be resolved without a trial on the issue, Judge Ainsworth concluded that the intertwined issue of immunity could not be resolved "without a trial on the merits" (Appendix D).

Simultaneous with his effort to renew his motion for summary judgment Chairman Pfister had filed a third-party complaint against the other legislative members of the Louisiana Joint Committee alleging that they were liable to him for all or part of any sum the plaintiffs might recover from him upon the theory that any of his actions giving rise to liability to the plaintiffs were authorized and approved by the entire Committee. The third-party defendants moved to dismiss and for summary judgment, raising the issue of legislative immunity. The district judge, while denying Chairman Pfister's motion for summary judgment (Appendices C and D), granted the third-party defendants' motion for summary judgment. Chairman Pfister appealed this decision to the Court of Appeals for the Fifth Circuit.

On November 14, 1966, the Court of Appeals for the Fifth Circuit (Circuit Judges Brown, Wisdom and Circuit

Judge Burger of the District of Columbia Circuit sitting by designation), in an opinion by Circuit Judge Wisdom reversed the judgment in favor of the third-party defendants, members of the Legislative Committee. *Pfister* v. *Arceneaux*, #22562, Court of Appeals for the Fifth Circuit. (The opinion of the Court of Appeals is reproduced as Appendix E.) The Court of Appeals held that since there was a disputed issue of fact as to whether the committee members were involved in any way in the raids and seizures this "has a serious bearing on the question whether Pfister and the other members of the Committee were 'acting in the sphere of *legitimate* legislative activity' *Tenney* v. *Brandhove*, 1951, 341 U.S. 367, 376, 71 S. Ct. 783, 95 L. Ed. 1019, 1927 [emphasis added] which would entitle them to immunity." Appendix E. Thus the Court of Appeals for the Fifth Circuit concluded that a "genuine issue as to . . . [a] material fact" was created requiring the reversal of the judgment granting the motion for summary judgment. Appendix E.

As a result of these decisions by the Eastern District of Louisiana and the Court of Appeals for the Fifth Circuit, the cause of action for money damages arising out of the illegal raids and seizures in the first action against Chairman Pfister of the Louisiana Joint Committee, the Louisiana police officers involved, and the third-party defendants, members of the Louisiana Joint Committee, will be tried on the merits in the federal District Court for the Eastern District of Louisiana, and is presently on the trial calendar.[17]

---

[17] Since Pfister was appealing the dismissal of the third-party complaint in the interest of "judicial economy" Judge Ainsworth granted his request for an order for an interlocutory appeal under 28 U.S.C. 1292(b) from the refusal to grant his motions for summary judgment in the main money damages cause of action. However, the Court of Appeals for the Fifth Circuit thereafter dismissed Chairman Pfister's appeal. *Pfister* v. *Dombrowski*, Misc. #168, 1965, Court of Appeals for the Fifth Circuit (denying leave to take the interlocutory appeal).

These decisions of the Court of Appeals for the Fifth Circuit and the Federal District Court for the Eastern District of Louisiana are in direct and sharp conflict with the decision of the Court of Appeals for the District of Columbia brought here for review by the writ of certiorari. This conflict between the Circuits over the applicability of the doctrine of legislative immunity to civil rights damage actions arising out of the context of events previously considered by this Court in *Dombrowski* v. *Pfister* is grounded in large measure upon a fundamental difference in the interpretation of the Speech or Debate Clause and the controlling decisions of this Court.

Summary of Argument

This case raises a series of issues arising once again out of the factual complex which was before the Court in *Dombrowski* v. *Pfister* in the October, 1964, Term, 380 U.S. 479. Here, again, as in the original *Dombrowski* case, questions arising out of petitioners' effort to seek redress in the national courts for injuries to their fundamental constitutional rights raise considerations of importance not only to the enforcement of laws protecting civil rights but to the very essentials of a judicial system which rests upon the premise that this is a government of law and not men.

I.

Respondents stand charged with participation in a knowing concert of action with state officials under color of state law to engineer illegal raids, seizures and arrests in violation of the Fourth Amendment for the purpose of deterring the petitioners and other citizens from exercising federally secured rights in efforts to implement the constitutional promise of racial equality and justice. The lower court concedes that absent considerations of legislative immunity

the disputed question of respondents' participation in the conspiracy could only be resolved by trial. But the concept of legislative immunity embedded in the Speech or Debate Clause does not immunize the respondents from liability in the cause of action for money damages.

1. The blanket immunity which the lower court throws over the illegal acts of the respondents is not sanctioned by the landmark opinions of this Court interpreting the Speech or Debate Clause. *Tenney* v. *Brandhove,* 341 U.S. 367, refutes the concept that immunity is invoked wherever the legislator utilizes his official position to facilitate or cloak his illegal or criminal activities. *Tenney* emphasizes that the sweep of the constitutional immunity extends only to conduct within "the sphere of legitimate legislative activity". And in *Tenney* the Court warned that boundaries to the immunity will be enforced where acts of legislators outside the sphere of "legitimate legislative activity" violate the rights of private individuals.

Last Term in *United States* v. *Johnson,* 383 U.S. 169, the Court warned against a distortion of the legislative immunity doctrine which would blunt the distinction between "legitimate legislative activity" and unlawful conduct for which a legislator remains accountable at law. *United States* v. *Johnson* stressed that conduct of a legislator such as the participation of these respondents in the charged illegal conspiracy which "is in no wise related to the due functioning of the legislative process" is not reached by the protection of the Speech or Debate Clause. The opinion of the Court in *United States* v. *Johnson* makes it clear that the Clause, designed to protect the free speech of legislators, will not be distorted into an instrument for the destruction of the free speech and liberties of citizens, which it would become if read as a blanket immunity for unlawful acts, unrelated to the due functioning of the legislative process, and destructive of the fundamental rights of the citizens.

The first decision of the Court considering the Clause, *Kilbourn* v. *Thompson,* 103 U.S. 168, made it very clear that careful boundaries must be observed in enforcing the legislative immunity. *Kilbourn* emphasized that there is no legislative immunity for wrongful, illegal or criminal acts which are not those "generally done in a session of the House by one of its members in relation to the business before it." Such an act was the illegal arrest of the plaintiff Kilbourn by the Sergeant-at-Arms of the House. Such an act was the participation by these respondents in the conspiracy to contrive the illegal raids and seizures of October 4.

The guidelines and boundaries to the legislative immunity which emerge out of the decisions of this Court indicate that (1) where the claimed responsibility for a wrongful or illegal act rests *solely* upon legitimate legislative activity such as offering or voting for a resolution on the floor, the Clause will immunize the legislator from liability for the wrongful act; (2) where the cause of action for legal redress rests *in part* upon legitimate legislative activity such as an act of making a speech on the floor, the Clause will require a "purging" of the legal action of "elements offensive to the Clause" but will not immunize the wrongful act or protect the legislator from trial, and (3) where, as here, the cause of action rests *wholly* upon wrongful and illegal conduct which is not "generally done in the House" or is not "legitimate legislative activity", no legislative immunity attaches whatsoever.

2. The English history of the concept of legislative immunity and the ultimate English judicial resolution of the complex and contradictory influences involved in the emergence of the parliamentary privilege are deeply related to the "presuppositions of our political history" essential to an understanding of the meaning and scope of the Speech or Debate Clause. *Tenney* v. *Brandhove,* 341 U.S. at 372.

This rich history reveals that the firm boundaries to the privilege which this Court has recognized from *Kilbourn* to *Johnson* are necessary in order, on the one hand, to preserve the privilege as the bulwark of parliamentary free speech and independence from the executive, and on the other hand to restrict the privilege from becoming a means of perpetuating a legislative tyranny destructive of the rights of individual citizens. The ultimate English judicial resolution of the limits and scope of legislative immunity embodied in the landmark decisions of *Stockdale* v. *Hansard*, 9 A.D. & E. 1, and reflected in the opinions of this Court in interpreting the Speech or Debate Clause, firmly preserves the true purpose of the legislative privileges by "setting them on the foundation of reason and limiting them by the fences of the law". *Stockdale* v. *Hansard, supra.*

3. The recent decision by the Fifth Circuit in the Louisiana branch of the litigation, *Pfister* v. *Arceneaux*, (No. 22562, Nov. 14, 1966) supports the conclusion that the mantle of legislative immunity may not be placed over participation in a conspiracy to carry through illegal raids and seizures. The decision of the Fifth Circuit turns on the recognition that participation in illegal raids, arrests, and seizures, in violation of the Fourth Amendment, is simply not "legitimate" legislative activity. As a result of the *Pfister* v. *Arceneaux* decision all the Louisiana state officials charged with participation in the illegal conspiracy will be required to stand trial in a federal court. The conclusions which underlie the Fifth Circuit decision are equally applicable here. These respondents likewise should be required to stand trial on the disputed issue of fact as to their participation in the illegal conspiracy concerning the October 4 raids.

4. The Solicitor-General appears to agree in this Court, contrary to the position of the respondents below, that the Speech or Debate Clause cannot protect the respondents

from the charge that they were parties to the conspiracy involving the October 4 raids. He prefers to argue as to this central question that the lower court was wrong in finding that there *were* disputed issues of fact as to the respondents' participation in the conspiracy requiring trial. He does suggest, however, that to the degree that the complaint rests *not* on the charge of "complicity in the October 4 searches" but on the unauthorized use of the subpoena power by the respondents, immunity may attach. This suggestion must be rejected for several reasons:

(a) In *Wheeldin* v. *Wheeler,* 373 U.S. 656, in this Court, the Solicitor-General conceded, on essentially similar facts, that the unauthorized use of the subpoena power by a respondent was "not acting sufficiently within the scope of his authority to bring the [immunity] doctrine into play", 373 U.S. at 647.

(b) The Solicitor-General suggests that the admittedly unauthorized use of the subpoena power by the respondents may have been brought back into the sphere of "legitimate legislative activity" by a purported subsequent November 14 resolution of the Subcommittee. This Court has firmly rejected any efforts at retroactive authorization of investigatory activity by a Congressional Committee or Congressman. *Gojack* v. *United States,* 384 U.S. 702, 715.

(c) The requirement of authorization for compulsory process is a fundamental minimal barrier against legislative intrusion into constitutionally insulated areas of the liberties of citizens. *Watkins* v. *United States,* 354 U.S. 200. The recent decisions of this Court make it amply clear that the unauthorized use of compulsory process to enforce investigatory activities which intrude upon the area of protected liberties is not a "legitimate" legislative activity.

II.

1. Respondent Sourwine is not a member of Congress. The protection of the Speech or Debate Clause does not, in any event, extend to him. This question was settled by the Court in *Kilbourn* v. *Thompson* when the Court upheld a cause of action in damages against the Sergeant-at-Arms of the House.

2. The lower court suggests that the doctrine of official or executive immunity as developed by the Court in *Barr* v. *Matteo*, 360 U.S. 564, may extend to respondent Sourwine as an employee of the legislature. But the doctrine enunciated in *Barr* v. *Matteo* does not immunize the charged conduct of respondent Sourwine for several reasons:

(a) The considerations which led the Court in *Barr* v. *Matteo* to extend the immunity doctrine to executive officers are not applicable in the legislative arena. General extension of the executive privilege to employees of the legislature would undermine the proper limitations upon legislative immunity which the Clause itself invokes.

(b) Even if applicable to legislative employees, the Solicitor-General has conceded, in an identical situation, that the doctrine has no applicability here where employees of a Congressional investigating committee utilize unauthorized subpoenas. *Wheeldin* v. *Wheeler, supra.*

(c) The doctrine enunciated in *Barr* v. *Matteo* would permit immunity to attach only where the acts complained of fall within the scope of the official duties of the defendant and relate to matters committed by law to his control or supervision. It is abundantly clear that participation in a conspiracy to contrive illegal raids and searches and seizures, in violation of the Fourth Amendment, was not within the scope of respondent Sourwine's official duties.

(d) Finally, there is a very serious question as to whether the judicially constructed doctrine of official im-

munity is applicable at all to actions brought under the Civil Rights Act. To grant immunity to this respondent who is charged with conspiring with state officials to violate First, Fourth and Fourteenth Amendment rights of citizens through participation in the plans concerning the October 4 raids would nullify the whole purpose of the Civil Rights Statute.

III.

In this Court the respondents have chosen not to remake their argument below that immunity protects them from the charge of participation in the conspiracy concerning the October 4 raids. Instead they rest their defense to this claim on the assertion that summary judgment was proper since the petitioners have failed to put forward a serious claim that the respondents were parties to the conspiracy.

However, the difficulty with this position is that the Court of Appeals has concluded that there *were* disputed facts in the record requiring exploration and resolution by means of a trial as to whether respondents were parties to the knowing concert of action. And the record facts, consisting primarily of admissions contained in the respondents' own affidavits and depositions, fully support the conclusion of the lower court that this issue requires resolution by means of a trial. These record facts show in a startling fashion that "joint and collaborative action was pervasive in the initiation, execution and fulfillment of the plan." *United States* v. *General Motors Corp.*, 86 S. Ct. 1321. The question as to respondents' participation in the conspiracy can only be settled, as the lower court concedes, by resolution at a trial.

IV.

The District Court dismissed the cause of action for equitable relief without a hearing on the allegations treating it as a request for injunctive relief against a Committee of

the Senate. The Court of Appeals properly disregarded this contention pointing out that the complaint sought injunctive relief solely against the individual respondents. However, the Court of Appeals approved the dismissal of the equitable cause of action solely upon the assumption that the relief sought would not be effective, since other members of the Subcommittee would still have use of the seized documents. This assumption was wholly unwarranted on the record. Petitioners were entitled to a hearing to determine the validity, if any, of the defense of futility. *Virginia Ry.* v. *System Federation*, No. 40, 300 U.S. 515, 550. In light of one of the central purposes of the charged conspiracy—the obtaining of membership lists of a civil rights organization—petitioners had good cause to be concerned that these lists, illegally seized in the October 4th raids, might be used privately and improperly by the respondents. In any event, dismissal without a hearing was highly prejudiced and legitimated a course of conduct of respondents designed to frustrate any effort to invoke the processes of law to protect these petitioners from the harmful effects of raids and seizures both the Louisiana courts and this Court have condemned as unlawful.

POINT ONE

The Speech or Debate Clause does not immunize the respondents from liability under the cause of action for money damages.

The decision of the Court of Appeals now brought here for review rests upon a distortion of the doctrine of legislative immunity which is at war with the applicable decisions of this Court interpreting the thrust of the Speech or Debate Clause,[18] as well as the first principles of a govern-

[18] ". . . for any speech or debate in either house, they shall not be questioned in any other place." Article I, § 6, Constitution of the United States.

ment, predicated upon the assumption that no man, no matter how high his position, stands wholly above the law. *Cf. Marbury* v. *Madison*, 1 Cranch 137, 163-168.

The unprecedented implications in the interpretation which the lower court gives to the sweep of the constitutional doctrine of legislative immunity are best seen within the context of an analysis of the structure of the court's own conclusions.

The lower court does not question the jurisdiction of the district court to entertain the cause of action for money damages either under the Constitution [19] or under the Civil Rights Statutes.[20] Nor does the lower court voice any hesitation as to whether the complaint adequately states a cause of action for money damages under the Civil Rights Statutes.[21] And furthermore, the lower court does not seriously entertain any doubts as to the presence in the record of material disputed issues of fact as to whether the respondents were "parties to a knowing concert of action

---

[19] *Bell* v. *Hood*, 327 US 678; *Wheeldin* v. *Wheeler*, 373 US 647; *Bock* v. *Perkins*, 139 US 628.

[20] *Monroe* v. *Pape*, 365 US 171; *Lee* v. *Hodges*, 321 F. 2d 480 (CA 4, 1963); *Nesmith* v. *Alford*, 318 F. 2d 110 (CA 5, 1963); *Hughes* v. *Johnson*, 305 F. 2d 67 (CA 9, 1962); *Cohen* v. *Norris*, 300 F. 2d 24 (CA 9, 1962); *Basista* v. *Weir*, 340 F. 2d 74 (CA 3, 1965); *Beauregard* v. *Wingard*, 230 F. Supp. 167 (D.C. S.D. Cal. 1964); *Bargainer* v. *Michal*, 233 F. Supp. 270 (D.C. N.D. Ohio, 1964).

[21] *Monroe* v. *Pape*; *Nesmith* v. *Alford*; *Lee* v. *Hodges*; *Hughes* v. *Johnson*; *Cohen* v. *Norris*; *Basista* v. *Weir*; *Beauregard* v. *Wingard*; *Bargainer* v. *Michal*, all *supra*. Cf. *Dombrowski* v. *Pfister*, *supra*, at p. 490. It is significant in this respect that this Court specifically held in the first Dombrowski opinion that the allegations of that complaint "state a claim under the Civil Rights Act, 42 USC 1983" citing *Beauregard* v. *Wingard*, and *Bargainer* v. *Michal*, *supra*. The allegations of the present complaint for money damages under 1983 are, of course, identical in substance to the *Dombrowski* v. *Pfister* complaint, arising out of the same factual situation. See Statement of Facts, *supra*.

with the state officials . . . requiring exploration and resolution by means of a trial." (R. 105).

Nevertheless, despite clear federal jurisdiction, an adequately pleaded cause of action, and acknowledged genuine issues of fact in the record as to the respondents' participation in a knowing concert of action with state officials under color of state law to engineer illegal raids, seizures and arrests, in violation of the Fourth Amendment for the purpose of depriving the petitioners of federally secured rights, the lower court reads the Speech or Debate Clause as casting a mantle of total immunity over these respondents in any actions for damages resulting from their conduct. This would stretch the immunity doctrine to unrecognizable dimensions and transform a concept historically fashioned as a shield to protect the freedom of speech of legislators from the oppressive tyranny of an overbearing executive, *cf. United States* v. *Johnson*, 383 U. S. 169, 181, into a privileged sanctuary for men in high places to participate in illegal activities destructive of the liberties of the citizens in open violation of the Constitution they are sworn to uphold. *Cf. Stockdale* v. *Hansard*, 9 AD. & E. 1, 112 Eng. Reports 1112 (1839, opinion of Lord Denman. Such a distortion of the concept of legislative immunity finds no support either in the historical matrix in which the constitutional guarantee was shaped or in the landmark decisions of this Court defining the contours of the Clause from *Kilbourn* v. *Thompson*, 103 U.S. 168, to *Tenney* v. *Brandhove*, 341 U.S. 367, to *United States* v. *Johnson, supra*, in the last Term of Court.

1. Legislative immunity is not available to the respondents under the governing decisions of this Court.

(a) TENNEY V. BRANDHOVE DOES NOT SANCTION THE BLANKET IMMUNITY IMPOSED BY THE LOWER COURT.

Although the lower court has found that it would have "considerable difficulty" in concluding that the issue of the respondents' participation with state officials in a

knowing concert of action to illegally seize the SCEF records did not require resolution by means of a trial (R. 105), it nevertheless read the opinion of this Court in *Tenney* v. *Brandhove*, as sanctioning the broad cloak of immunity it cast over the respondents' participation in the illegal conspiracy. *Tenney*, however, rejects any such concept of blanket immunity.

The lower court reads Mr. Justice Frankfurter's opinion for the Court in *Tenney* as requiring the imposition of a shield of legislative immunity in all circumstances where a legislator under color of his official position engages in illegal and unconstitutional activities violative of fundamental rights of citizens. Thus the lower court brushes aside its own conclusion that the record evidence showed contested facts requiring resolution by trial as to respondents' participation in a conspiracy with state officials to utilize Louisiana law to contrive false arrests and illegal raids, by suggesting that "this . . . ignores that the conduct of which appellants [petitioners] complain could not have been undertaken had appellees [respondents] had no official legislative positions and responsibilities" (R. 108-109). But this is the heart of the problem. A doctrine which immunizes the illegal and criminal acts of a legislator merely because the legislator uses his official position to accomplish the violation of law would sanction a governmental tyranny wholly destructive of the liberties of citizens.

No greater danger to a free society exists than the concept that men in high places are immune to the prohibitions of the law merely because they hold these high positions. A policeman who beats a citizen or who seizes his property without a warrant is not immune from legal recourse by the citizen because the policeman wears his uniform and carries his badge while he beats his victim or seizes his possessions in violation of the Fourth Amendment. *Cf. Monroe* v. *Pape, supra.* Similarly, a legislator

who takes part in a conspiracy to defraud the United States is not immune from legal sanction merely because he has utilized his position as a Member of Congress to further the objectives of the illegal conspiracy. *United States* v. *Johnson*, 383 U.S. 169.

The teaching of the Court in *Tenney* refutes the concept which the lower court seems to embrace—that immunity is properly invoked wherever the legislator utilizes his official position to facilitate or to cloak his illegal or criminal activities. *Tenney* rejected any such limitless concept of legislative immunity in a careful opinion by Mr. Justice Frankfurter which, as the entire Court agreed, set forth the "general principles governing the liability of legislative committees and members of the legislature." 341 U.S. at 379, 381.[22]

In *Tenney*, Mr. Justice Frankfurther carefully pointed out that the test of the appropriateness of an invocation of legislative immunity is not the official status of the legislator *qua* legislator but rather the nature of the actions he is called to account for. Thus the critical question becomes whether "it appears that the defendants were acting in the sphere of legitimate legislative activity". 341 U.S. at 376. This is because the sweep of the constitutional immunity extends only to conduct within "the sphere of legitimate legislative activity". 341 U.S. at 376.

The reasons for the limitation of the scope of the immunity to "legitimate legislative activity", 341 U.S. at 376,

---

[22] Mr. Justice Douglas, while he dissented from the result of the case, stated that:

> "I agree with the opinion of the Court as a statement of general principles governing the liability of legislative committees and members of the legislature." 341 U.S. at 381.

Mr. Justice Black, in his concurring opinion, stated:

> "I substantially agree with the Court's reasoning and its conclusion." 341 U.S. at 379.

to actions taken "within their traditional sphere . . . where legislators traditionally have power to act . . .", 341 U.S. at 379, are understandable in Mr. Justice Frankfurter's words, "once they are related to the presuppositions of our political history", 341 U.S. at 372. As the Justice so clearly demonstrates, the legislative privilege with its "taproots in the Parliamentary Struggles of the Sixteenth and Seventeenth Centuries", 341 U.S. at 372, was designed to preserve the fundamental freedom of speech of the chosen representatives of the people. The Justice reminds us that the "reason for the privilege . . . was well summarized by James Wilson, an influential member of the Committee of Detail, which was responsible for the provision in the Federal Constitution. 'In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence' ". 341 U.S. at 373.[28]

But "the presuppositions of our political history", 341 U.S. at 372, also teach that an immunity designed to protect the freedom of speech of the elected representatives of the people would never have been conceived of as an open-ended sanction to arbitrary acts of legislators in violation of the fundamental liberties of citizens. The men who deemed freedom of speech "so essential for representatives of the people", 341 U.S. at 372, were also men who were fearful of the "tyranny of legislatures", 367 U.S. at 375, fn. 4. As Justice Frankfurter points out, "It is significant that legislative freedom was so carefully protected by constitutional framers at a time when even Jefferson expressed fear of legislative excess", 367 U.S. at 375. To men to whom "the tyranny of the legislatures is the most formidable dread at

[28] See II works of James Wilson (Andrews ed. 1896) 38, cited in *Tenney* at p. 373.

present, and will be for long years''[24] to men who characterized the legislative department as ''drawing all power into its impetuous vortex''[25] a legislative immunity without boundaries which would carefully protect the liberties of citizens would have been anathema. The lesson of recent English history was too clear. A privilege of legislative immunity without bounds and limits was the path to the dreaded ''tyranny of the legislatures''.[26] Accordingly, as Justice Frankfurter points out, an ''unwarranted extension of privilege'' will not be permitted to be a path for legislatures or legislators to ''acquire power'', 341 U.S. at 366.

The careful formulation of the Court in *Tenney* attempts to accommodate these ''presuppositions of our political history'', *supra*, at 372. The concern for the protection of the freedom of speech of the people's elected representatives is preserved within the context of guarding against a legislative tyranny destructive of the rights of citizens, by insisting, as the Court does in *Tenney*, that the immunity may be invoked only where the legislators are ''acting in the sphere of legitimate legislative activity'', 341 U.S. at 376. It follows, accordingly, that where the acts of a legislator which violate the rights of individuals are not within the sphere of ''legitimate legislative activity'' immunity is

---

[24] This statement of Jefferson, Mr. Justice Frankfurter found in a letter to Madison, March 15, 1789, "to be published in a forthcoming volume of The Papers of Thomas Jefferson." (Boyd ed.) 367 U.S. at 375, fn. 4.

[25] Madison, The Federalist, No. XLVIII, cited in 367 U.S. at 375.

[26] See Wittke, *The History of English Parliamentary Privilege*, p. 17. "At first, perhaps, it was essential to make each house the sole judge of its own privileges, but it was not long until this principle was grossly abused. As a matter of fact, both houses, especially in the seventeenth and eighteenth centuries, made such additions to their privileges, and invented so many new ones, that the subject was often the victim of a Parliamentary Tyranny which deprived him of even his ordinary common law remedies and guarantees."

not available. That this constitutional boundary is to be a real one which the Court will enforce is made evident in Mr. Justice Frankfurter's warning that: "This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role. *Kilbourn* v. *Thompson, supra; Marshall* v. *Gordon,* 243 U.S. 521; *Cf. McGrain* v. *Daugherty,* 273 U.S. 135, 176", *supra,* at 377.

The importance of the controlling boundaries for the legislative immunity doctrine developed in Mr. Justice Frankfurter's discussion in his opinion for the Court is highlighted in the concurring opinion of Mr. Justice Black. The Justice sharply emphasizes the limiting character of the Court's analysis in his concurring opinion:

> "The Court holds that the Civil Rights statutes were not intended to make legislators personally liable for damages to a witness injured by a committee exercising legislative power. This result is reached by reference to the long-standing and wise tradition that legislators are immune from legal responsibility for their intra-legislative statements and activities. The Court's opinion also points out that *Kilbourn* v. *Thompson,* 103 US 168, 28 L.Ed. 377, held legislative immunity to have some limits, and today's decision indicates that there is a point at which a legislator's conduct so far exceeds the bounds of legislative power that he may be held personally liable in a suit brought under the Civil Rights Act. I substantially agree with the Court's reasoning and its conclusion." 341 US at p. 379.

Far from sanctioning a blanket immunity for the complained of acts of the respondents, the principles enunciated in *Tenney,* in Mr. Justice Frankfurther's opinion for the Court and underscored in the concurring opinion require a reversal of the judgment below and a reinstitution of the cause of action for money damages. Having rejected respondents' primary position—that petitioners had failed to

put forward a serious claim that respondents were parties to a knowing concert of action with the state officials, requiring exploration and resolution by means of a trial (R. 105)—the lower court's invocation of immunity in the name of *Tenney* flies in the face of the clear limiting words of that opinion. Participation in a conspiracy with state officials to utilize state laws to contrive the arrest of citizens without cause, to engineer raids on their offices and homes and to seize their property in violation of the Fourth Amendment, is hardly "legitimate legislative activity". *Cf. Tenney*, 341 US at p. 376.[27] Nor is such a conspiracy to violate the federal rights of citizens "a field where legislators traditionally have power to act". *Cf. Tenney*, 341 US at p. 379. As Mr. Justice Black warned in his concurring opinion, the Court in *Tenney* has said "that there is a point at which a legislator's conduct so far exceeds the bounds of legislative power that he may be held personally liable in a suit brought under the Civil Rights Act." 341 US at p. 379. This case presents to the Court such a point. It is difficult to imagine any conduct which more "exceeds the

---

[27]We do not feel that it is necessary to argue at any great length that a conspiracy to violate the Fourth Amendment rights of citizens is not within any conventionally understood meaning of the word "legitimate" legislative activity. *Cf. Pfister* v. *Arceneaux, supra,* opinion of Circuit Judge Wisdom, Appendix E to this Brief. The values which the Fourth Amendment protects are among the most fundamental in our civilization. *Boyd* v. *United States,* 116 U.S. 616 (opinion by Mr. Justice Bradley); *Weeks* v. *United States,* 232 U.S. 383; *Mapp* v. *Ohio,* 367 US 643. *Cf. Entick* v. *Carrington,* 19 How. St. Tr. 1029 (C.P. 1765). See *Berkowitz* v. *United States,* 340 F.2d 168 (CA 1, 1965, opinion by Judge Wyzanski) "We need not rehearse here the historical, political, and ethical considerations underlying the Amendment. The American view of ordered liberty finds no clearer distinction from totalitarianism or other forms of despotism than in our recognition that privacy is a principal object of civilization. We are held together as a community by our respect for one another." 340 F.2d at 170. It is unthinkable that a "knowing concert of action" to violate these fundamental interests of citizens could ever be regarded as a "legitimate" legislative activity. *Cf. Tenney,* 341 U.S. at p. 376.

bounds of legislative power". If participation in a conspiracy with state officers to engineer illegal raids and seizures in violation of the Fourth Amendment is to be immune from redress in a court of law under some formless concept of legislative immunity then we would face, in truth, the reality of Jefferson's "formidable dread" of "the tyranny of legislatures". *Tenney*, 341 US at p. 375. *Tenney*, however, sanctions no such distortion of the original purposes of the Constitutional provision. Since the charged participation of respondents in the illegal conspiracy is under no possible interpretation of the record facts "within the sphere of legitimate legislative activities", *Tenney* requires the reinstatement of the cause of action for money damages.[28]

---

[28]The application of the *Tenney* principles to the facts in that case underscores the conclusions that here the acts complained of lie outside the sphere of "legitimate legislative activity". In *Tenney* the theory of the complaint was that a legislative hearing was held for improper reasons resulting in damage to the plaintiff. The Court pointed out that this act, the holding of the legislative hearing, was a "traditional" and "legitimate legislative activity". 341 U.S. at 378, 379. This was the sole thrust of the complaint. The Court emphasized that if the legislative hearing "exceeded the bounds of legislative power" the result would be different. 341 U.S. at 378. But as the Court there said, "the present case does not present such a situation." 341 U.S. at p. 378. All that the plaintiff in *Tenney* complained of was the impact upon him of a legitimate legislative activity, improperly motivated. And as the Court said, "the claim of an unworthy purpose does not destroy the privilege." 341 U.S. at p. 377. *Cf. United States* v. *Johnson, supra.* Here, unlike in *Tenney*, the complaint concerns not a "legitimate legislative activity" such as an authorized and proper legislative hearing, (but see Mr. Justice Douglas' dissent in *Tenney*, 341 U.S. at p. 381) which is claimed to be improperly motivated, or a speech on the floor claimed also to be improperly motivated, cf. *United States* v. *Johnson, supra*, but rather activity itself clearly outside the sphere of "legitimate legislative activity"—participation in a conspiracy to contrive under color of state law illegal raids, seizures, and arrests. Under *Tenney* the acts complained of, to be immunized, must be *legitimate* legislative activity. See the recent opinion of Circuit Judge Wisdom for the Fifth Circuit, in the Louisiana branch of the current litigation,

(b) The Opinion in United States v. Johnson Forecloses Reliance upon the Speech or Debate Clause as Immunizing Respondents' Conduct.

Only last Term the Court warned against a distortion of the legislative immunity doctrine which would blunt the distinction between "legitimate legislative activity" *cf. Tenney, supra,* at p. 376, protected by the Speech or Debate Clause, and unlawful conduct for which a legislator remains accountable at law. In *United States* v. *Johnson,* 383 U.S. 169, 86 S. Ct. 749 (1966), Mr. Justice Harlan, in the opinion for the Court reversing the conviction of a Congressman for violation of the conflict of interest statute and conspiracy to defraud the United States, carefully pointed out that while reliance upon a speech made by the defendant on the floor of the House during the trial of the conspiracy count violated the Speech or Debate Clause, only the speech was immunized and not the charged unlawful conduct or the conspiracy itself. Thus Mr. Justice Harlan warned for the Court:

> "The bulk of the evidence submitted as to Johnson dealt with his financial transactions with the other conspirators, and with his activities in the Department of Justice. As to these aspects of the substantive counts and the conspiracy count, no substantial question is before us. 18 U.S.C. § 371 has long been held to encompass not only conspiracies that might involve loss of government funds, but also 'any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any

Pfister v. *Arceneaux* (Nov. 14, 1966, Appendix E to this Brief), applying this analysis to motions of the members of the Joint Louisiana Committee seeking to be dismissed as third-party defendants in the first action brought in the Louisiana federal courts. The Court of Appeals for the Fifth Circuit has found that a disputed issue of fact as to the defendant committee members' participation in the raids and seizures raises a question of fact as to whether their activities could be immunized under *Tenney* as "*legitimate* legislative activity" (emphasis supplied by the Court) precluding the granting of summary judgment. See Appendix E.

> department of government.' *Haas* v. *Henkel*, 216 U.S. 462, 479, 30 S. Ct. 249, 254, 54 L.Ed. 569. No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice that is in no wise related to the due functioning of the legislative process."

The sharp distinction drawn by the Court between the limited immunizing effect of the Clause upon the speech made on the floor of the House and the charged unlawful conspiracy is highlighted by the Court's action in *Johnson*. The Court of Appeals' opinion might have been interpreted as dismissing in its entirety the conspiracy count as "unconstitutional as applied to defendant Johnson" under Article I, § 6. *United States* v. *Johnson*, 337 F.2d 180 (CA 4, 1964, opinion by then Chief Judge Sobeloff). This Court carefully corrected this disposition of the conspiracy count, holding in Mr. Justice Harlan's words:

> "The Court of Appeals' opinion can be read as dismissing the conspiracy count in its entirety. The making of the speech, however, was only a part of the conspiracy charge. With all references to this aspect of the conspiracy eliminated, we think the Government should not be precluded from a new trial on this count, thus wholly purged of elements offensive to the Speech or Debate Clause."

Thus the Court in *Johnson* did not sanction any overall immunity for the Congressman *qua* Congressman but remanded both the conspiracy counts and the substantive counts, "purged of elements offensive to the Speech or Debate Clause"—namely the speech itself—for a new trial.[29]

---

[29]The Chief Justice, with Mr. Justice Brennan and Mr. Justice Douglas, would have gone further. They would have affirmed the substantive counts for violation of the conflict of interest statute without remanding for a new trial on the ground that in the trial on the substantive counts "the speech was a minor part of the prosecution." *United States* v. *Johnson*, *supra*, at p. 189.

The impact of the teaching of *United States* v. *Johnson* upon this case is clear. As in *Johnson*, we do not believe that it could be successfully contended that the Speech or Debate Clause reaches conduct such as was involved in the presently charged conspiracy to utilize the overly broad anti-subversive laws of the State of Louisiana, *cf. Dombrowski* v. *Pfister, supra,* to contrive the illegal raids, seizures and arrests in violation of the Fourth Amendment. Such conduct is no less heinous than an "attempt to influence the Department of Justice", cf. *United States* v. *Johnson*, at p. 172, and no less prohibited by applicable federal statutes.[30] As in *Johnson* the "bulk of the evidence"

---

[30]The conspiracy here charged is not only prohibited by the civil sanctions of 42 U.S.C. 1983 and 1985, *Cf. Dombrowski* v. *Pfister, supra,* at p. 490, but would appear also to present a *prima facie* case of violation of the applicable criminal statutes, 18 U.S.C. 241 and 242. Cf. the recent opinions of the Court in *United States* v. *Price*, 383 U.S. 787, 86 S.Ct. 1152; and *United States* v. *Guest*, 383 U.S. 745, 86 S.Ct. 1170 (1966).

It is readily apparent that the allegations made in the present complaint would be sufficient to sustain an indictment brought under either 18 U.S.C. §§ 241 or 242 as interpreted by this Court in *United States* v. *Price, supra,* if brought against either of the two respondents. The complaint alleges that, acting in concert with officials of the State of Louisiana, and under color of statutes of that state (since partially invalidated by this Court, *Dombrowski* v. *Pfister, supra*), the respondents conspired to obtain the records and files of the individual and corporate petitioners, and that to effectuate this purpose the state officials arranged to have the individual petitioner arrested and charged with violation of such statutes and, "incidental" to that arrest, to have the offices and home of the petitioners searched and ransacked and all pertinent materials removed therefrom, and further conspired to have the documents so seized surreptitiously removed from the State of Louisiana to the State of Mississippi. While respondents are not themselves officials of any state, it is clear from *Price* that 241 and 242 only require that they act in concert with such officials. "It is enough that he is a wilful participant in joint activity with the State or its officials." 383 U.S. at 794; see also *id.* at 799. It is also alleged that the respondents conspired to deprive the petitioners of rights protected by

[Footnote Continued on Page 42]

here deals with the respondents' "transactions with the other conspirators" and their "knowing concert of action" (R. 105), with the state officials in planning and contriving the illegal raids and seizures. This is action, analogous to the conspiracy charged in *Johnson*, which "is in no wise related to the due functioning of the legislative process", *supra*, at p. 172. It is action which the Speech or Debate Clause does not reach, *supra*, at p. 172.

The Court in *Johnson* underscores the nature of the conduct which is not reached by the immunizing scope of the Clause, when it focuses on the precise question which

[Footnote Continued from Page 41]

the Due Process Clause of the Fourteenth Amendment, most importantly the freedom from unlawful search and seizure, see *Mapp* v. *Ohio*, 367 U.S. 643, violated when the seizures were conducted under arrest warrants not based on probable cause, and the right to freedom of association, see *NAACP* v. *Flowers*, 377 U.S. 288, *Louisiana* v. *NAACP*, 366 U.S. 293, *NAACP* v. *Alabama*, 357 U.S. 449, violated when privileged membership lists were seized. The complaint charged that the respondents, together with the Louisiana state officials, sought to utilize the Louisiana laws as a pretext for the obtaining of the membership lists through raids and seizures, which they could not have obtained through lawful legislative process. As stated in *Price*, the language of § 241 "embraces *all* of the rights and privileges secured to citizens by *all* of the Constitution and *all* of the laws of the United States." 383 U.S. at 800. Further, the Court in *United States* v. *Guest*, 383 U.S. 745, holds that even a conspiracy by persons themselves having no official status will constitute an offense when they use the machinery or processes of the state to achieve their objective of depriving persons of federal rights. Here the complaint clearly alleges that the respondents conspired to use the processes of the state to obtain material they had no right to obtain and to do so in a manner they had no right to use in order to intimidate the petitioners and other citizens from seeking to implement the promise of racial equality guaranteed by the Equal Protection Clause. See, also, *Brown* v. *United States*, 204 F.2d 247 (6th Cir. 1953); *United States* v. *Ramey*, 336 F.2d 512 (4th Cir. 1964) cert. den. 379 U.S. 972; *Culp* v. *United States*, 131 F.2d 93 (8th Cir. 1942).

the prosecution there raised in terms of the impact of Article I, Section 6. Neither the conspiracy on its face nor the attempts to influence the Department of Justice raised any constitutional questions of immunity. Rather it was "the application of this broad conspiracy statute to an improperly motivated speech that raises the constitutional problem", *United States* v. *Johnson, supra,* at 172. The speech on the floor of the House falls within the protective orbit of the privilege. A speech on the floor, as Mr. Justice Harlan points out, clearly is included in the definition of the sweep of the Clause first suggested by the Court in its initial discussion of the constitutional provision in *Kilbourn* v. *Thompson,* 103 U.S. 168, that the "privilege should be read broadly to include not only 'words spoken in debate', but anything 'generally done in a session of the House by one of its members in relation to the business before it', 103 U.S. at 204", *United States* v. *Johnson, supra,* at p. 179. Where the essence of a charge is that a Congressman's act, such as making a speech, *United States* v. *Johnson, supra,* or proposing a resolution, *Kilbourn* v. *Thompson, supra,* is "improperly motivated", "this is precisely what the Speech or Debate Clause generally forecloses from executive or judicial inquiry." *United States* v. *Johnson, supra,* at p. 180. This is because the "prophylactic purposes of the clause", *supra,* at 182, to preserve the freedom of speech of the people's representatives, require that judicial or executive exploration into motives underlying legitimate legislative activity, "generally done in a session of the House", not be the occasion for harassment or intimidation of legislators. *Supra,* at 179-181. Cf. *Tenney* v. *Brandhove, supra; Fletcher* v. *Peck,* 6 Cranch 87, 130. Accordingly, in *Johnson,* the Court "purged" the conspiracy and substantive charges against the Congressman of any exploration into his motives in making the speech on the floor, while remitting the

cause back for a new trial on the charges of illegal conspiracy and violation of the conflicts of interest statute.[31]

Here, the conduct charged against the respondents is wholly beyond the protective orbit of the Speech or Debate Clause as delineated by the Court in *Johnson*. Unlike *Johnson*, in this case there is not even the necessity of "purging" the conspiracy count of "elements offensive to the Speech or Debate Clause", *supra*, at 187. This case does not rest in whole, or in part, upon a speech given by the respondents, cf. *United States* v. *Johnson*, *supra*, or upon a resolution offered on the floor, cf. *Kilbourn* v. *Thompson*, *supra*, or upon a duly authorized legislative hearing, *Tenney* v. *Brandhove*, *supra*. The respondents here are charged with conduct "in no wise related to the due functioning of the legislative process", *United States* v. *Johnson*, *supra*, at 172. Participation in a conspiracy with state officials to instigate illegal raids, seizures and arrests in violation of the Fourth Amendment is hardly activity "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson*, 103 U.S. at 204, cf. *United States* v. *Johnson*, *supra*, at 179. The gravamen of this complaint is not that "legitimate legislative activity" was "improperly motivated". Its thrust is wholly different. The charge here is that the respondents' participation with the state officials in the illegal conspiracy was "in no wise related to the due functioning of the legislative process", *United States* v.

---

[31] The limited impact of the immunity clause is emphasized in the concurring Justices' characterization of the Court's holding. Thus the Chief Justice wrote, in an opinion joined in by Mr. Justice Douglas and Mr. Justice Brennan:

> "I concur in the limited holding of the Court that the use of the Congressman's speech during this particular trial—with an examination into its authorship, motivation and content—was violative of the Speech and Debate Clause. I also join the Court in its remand of the conspiracy count for a new trial, this time purged of offensive matter." [*Supra*, at pp. 186-187.]

Johnson, supra, at p. 172. Such conduct, similar to the conspiracy and substantive charges in *Johnson* remitted for a new trial, is not reached by the Speech or Debate Clause.

As in *Tenney*, the careful opinion of the Court in *Johnson*, rejecting any limitless sweep to the concept of legislative immunity, rests as it must, upon a thoughtful probing of the "presuppositions of our political history" *Tenney* v. *Brandhove, supra,* at p. 372. Mr. Justice Harlan cautions us in approaching the Speech of Debate Clause to "look particularly to the prophylactic purposes of the clause" *United States* v. *Johnson, supra,* at p. 182. These he finds emerging out of the long "history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators" *United States* v. *Johnson, supra,* at 178. Out of this historical matrix was fashioned the concept of legislative privilege which reflected a determination to protect the freedom of speech and debate of the representatives of the people from "intimidation by the executive and accountability before a possibly hostile judiciary" *supra,* at p. 181. This concern with protecting the freedom of speech of the people's representatives against intimidation by a hostile executive or judiciary, Justice Harlan concludes, "is the predominate thrust of the Speech or Debate Clause", *supra,* at 182. But it would be ironic, indeed, if the legislative privilege of immunity designed to protect the free speech of legislators so that they may fearlessly represent the people's interest were to be turned into an instrument for the destruction of the free speech of citizens. Yet this will be the result unless the distortion of the immunity doctrine reflected in the lower court's opinion is not firmly rejected.

In illustrating for us the "prophylactic purposes" of the Speech and Debate Clause, *United States* v. *Johnson, supra,* at p. 182, Mr. Justice Harlan analogizes its thrust

to "the central importance to our political system of uninhibited political expression as guaranteed to the general populace by the First and Fourteenth Amendments" *supra*, at p. 182, fn. 12. This insight is instructive in understanding the necessity for a rigorous enforcement of the boundaries and limitations which history and the Court have written into the Speech and Debate Clause. Both constitutional values—"the independence and integrity of the legislature" on the one hand, *supra*, at 178, and "uninhibited political expression as guaranteed to the general public" on the other hand, *supra*, at 182,—are deeply interwined as the Court has recognized, *supra*, at 182, fn. 12. These separate but interrelated values are but reflections of a fundamental axiom upon which our society rests—the right of the people to govern themselves and to control their own destinies. *Cf. Whitney* v. *California*, 274 U.S. 357, 374 (concurring opinion of Mr. Justice Brandeis). If the central thrust of the Speech or Debate Clause is to protect the right of the people to self-government through a fearless and independent legislature it would frustrate that design and make a mockery out of its high purpose if it were to be read so as to sanction illegal activities of legislators which trench upon fundamental rights of citizens for the very purpose of impeding the "uninhibited political expression" which is equally "central . . . to our political system" *United States* v. *Johnson*, *supra*, at p. 182, and equally important to the ultimate question of the right of the people to govern themselves. *New York Times Co.* v. *Sullivan*, 376 U.S. 254.

Mr. Justice Harlan's opinion for the Court in *United States* v. *Johnson* makes it crystal clear that the Speech and Debate Clause may not be read in such a manner as to distort its basic purpose. An adjustment between the separate but interrelated values of the "independence and integrity of the legislature" and the "central importance of uninhibited political expression . . . [by] the general populace" can be achieved through the repudiation of the limitless and

open-ended immunity concept applied by the lower court, and an insistence that the boundaries of *Tenney* and *Johnson* be rigorously enforced, particularly where the doctrine of legislative privilege threatens to become a blanket immunity for unlawful acts, unrelated to the due functioning of the legislative process, and destructive of the fundamental liberties of the citizens.

A proper deference to the paramount constitutional objective of "uninhibited political expression", *United States* v. *Johnson, supra,* at p. 182, consistent with the protection of the "independence and integrity of the legislature", *United States* v. *Johnson, supra,* at p. 178, requires that the limitations to the legislative immunity doctrine, restated by the Court in both *Tenney* and *Johnson,* be adhered to and reaffirmed, particularly where, as in this case, the acts of the legislator, unrelated to any legitimate legislative activity, interfere with and deter the exercise of those rights the Court has characterized as being "central to our political system." *United States* v. *Johnson, supra,* at p. 182.

(c) No Legislative Immunity Attaches to the Acts of the Respondents Under the Rule of Kilbourn v. Thompson

Kilbourn v. *Thompson,* 103 U.S. 168 (1880) was the first occasion this Court had to consider the implications of the Speech or Debate Clause. In a comprehensive opinion the Court analyzed the boundaries of the legislative immunity doctrine and established certain guidelines which underlie the more recent decisions in *Tenney* and *Johnson.* These guidelines remain helpful in considering the impact of the constitutional privilege upon the present case.

Central to the Court's thinking in *Kilbourn* was the recognition that legislative immunity did not extend generally to everything a legislator did, regardless of its

relationship to the legislative process. The immunity was, as Mr. Justice Miller pointed out, limited to "things generally done in a session of the House by one of its members in relation to the business before it" 103 U.S. at 204. Thus, in applying the doctrine to the record before it, the Court drew a sharp distinction between certain acts of illegal arrest, trespass, and assault upon the plaintiff and the acts of presenting and voting for a resolution authorizing the actual arrest. The defendant members of Congress were charged only with the acts of presenting and voting for the resolution. Accordingly, although the Court had held, in a historic ruling, that the resolution of contempt voted against the plaintiff was in excess of the power conferred upon the House by the Constitution, and consequently void for want of jurisdiction, 103 U.S. at 196, the issue remained as to whether the defendant Members of Congress could be held liable in damages to the plaintiff. Here, the essence of the *Kilbourn* analysis emerges. Participation in any way in the unlawful acts of arrest or confining the plaintiff lay beyond the reach of any protective immunity mantle, 103 U.S. at 200, 201. The resolution or warrant of the House ordering the arrest, being void for want of jurisdiction, 103 U.S. at 196, were not available as a justification for any individual participating in the actual unlawful arrest or wrongful imprisonment, 103 U.S. at 200. Accordingly, the defendant, Thompson, Sergeant-at-Arms of the House, was held to be not immune to the cause of action for damages for unlawful arrest, 103 U.S. at 200, 205, not only because he was not a member of the legislature, *cf. Tenney* v. *Brandhove,* 341 U.S. at 378, but because legislative immunity itself did not attach to acts such as the wrongful arrest and imprisonment. These were acts which were not "things generally done in a session of the House by one of its members in relation to the business before it", 103 U.S. at 204.

On the other hand, where the only ground for assertion of liability rested upon "things generally done in a session

of the House by one of its members" such as "written reports presented in that body by one of its committees", 103 U.S. at 204, "resolutions offered", 103 U.S. at 204, "the act of voting, whether it is done vocally or by passing between the tellers", 103 U.S. at 204, the protection of the Speech or Debate Clause could be asserted, 103 U.S. at 201, 204. Where the only connection between the Congressmen defendants and the wrongful acts lay in their authorization of the acts through proposing and assenting to a resolution of the House, "things generally done in a session", the Clause provided immunity. 103 U.S. at 205.

The analytical basis for the *Kilbourn* opinion emerges clearly. There is no legislative immunity for wrongful, illegal, or criminal acts which are not those acts "generally done in a session of the House by one of its members in relation to the business before it". 103 U.S. at 204. Such an act was the illegal arrest and detention of the plaintiff *Kilbourn*. No immunity attached to anyone participating in this wrongful act whether or not the participant was a legislator. *Cf. United States* v. *Johnson*, 383 U.S. 169. The sweep of the immunity clause covers only legitimate legislative conduct through which the constitutional right of legislative free speech manifests itself [32] such as a speech

---

[32] The analogy to those cases in which this Court has discussed the constitutional guarantee of free speech is interesting. Cf. *United States* v. *Johnson*, 383 U. S. at 182, fn. 12. Where the act sought to be immunized from punishment is "pure speech", the making of a speech, *Thomas* v. *Collins*, 323 U.S. 516 (1944), the distribution of a leaflet, *Lovell* v. *Griffin*, 303 U.S. 444 (1937); cf. *Thornhill* v. *Alabama*, 310 U.S. 88 (1939), the publication of a newspaper, *Near* v. *Minnesota*, 238 U.S. 691 (1930); *New York Times* v. *Sullivan*, 376 U.S. 254 (1963), the First Amendment immunization from liability is almost absolute subject, of course, to the qualifications of the "clear and present danger" or requirement of "malice" limitations on the otherwise absolute immunity. *Schenck* v. *United States*, 249 U.S. 471 (1919); *New York Times* v. *Sullivan*, *supra*. Where on the other hand the act sought to be immunized has left the arena of "pure speech" and is in reality conduct otherwise illegal

[Footnote Continued on Page 50]

itself, *United States* v. *Johnson, supra,* a formal legislative hearing, *Tenney* v. *Brandhove, supra,* or the presentation of a committee report, the offering of a resolution, or the act of voting, *Kilbourn* v. *Thompson, supra.* Where the claimed responsibility for a wrongful or illegal act rests *solely* upon legitimate legislative activity such as offering and voting for a resolution, the Clause will immunize the legislator from liability for the wrongful act. *Kilbourn* v. *Thompson, supra.*[33] Where, however, the cause of action for

[Footnote Continued from Page 49]

under either state or federal law, the cases suggest that the immunity of the First Amendment may not here apply. *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1948); *Valentine* v. *Chrestenson*, 316 U.S. 52 (1941); *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); concurring opinion of Mr. Justice Black, 379 U.S. at 79. So in the area of legislative immunity where the acts of the legislator remain in the arena of "legitimate legislative activity" through which the constitutional right of legislative free speech manifests itself, *Kilbourn* v. *Thompson*, an absolute immunity exists subject to the *Kilbourn* proviso of an "act of an extraordinary character", 103 U.S. at 204. However, where the acts in question have left the arena of "legitimate legislative activity" and have become conduct otherwise wrongful or illegal, the constitutional immunity does not apply. *United States* v. *Johnson, supra.*

[33] Even here the *Kilbourn* Court suggested an important proviso. Even where the acts upon which liability is sought rest solely upon legislative activity undertaken in the legislature itself, such as passing a resolution, the Court warned that immunity may not be absolute. As Mr. Justice Miller pointed out:

> "It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible. If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate."

[Footnote Continued on Page 51]

legal redress rests *in part* upon legitimate legislative activity such as the act of making a speech on the floor of the House, the Clause will require a "purging" of the legal action of "elements offensive to the . . . Clause" but will not immunize the wrongful act or protect the legislator from trial. *United States* v. *Johnson, supra.* And finally, where, as here, the cause of action, like the cause of action against the Sergeant-at-Arms Thompson, rests wholly upon wrongful and illegal conduct which is not "generally done in a session of the House by one of its members" such as participating in an unlawful arrest, *Kilbourn* v. *Thompson,* or participating with state officers in a conspiracy to instigate illegal raids and seizures (R. 105), no legislative immunity attaches whatsoever. *Kilbourn* v. *Thompson, supra.*

[Footnote Continued from Page 50]

As in *Kilbourn* it is not necessary for this Court "to decide here" whether the acts charged to respondents are of the "extraordinary character" warned against by Mr. Justice Miller. The effort here is not to hold these respondents to account for any "legitimate legislative activity" *cf. Tenney* v. *Brandhove, supra,* or activity "generally done in a session of the House", *Kilbourn* v. *Thompson,* 103 U.S. at 204. The acts charged to the respondents, the participation in the knowing concert of action with the state officials to effectuate the illegal raids, seizures and arrests, are of course not of this nature. If, however, the acts of the respondents were to be considered in some way as being "legitimate legislative activity", and on this record we would suggest that such an assumption would be impossible, the Court would only then face the necessity of considering whether the moment Mr. Justice Miller warned of in *Kilbourn* had arrived—whether the conduct of respondents, although "generally done in a session of the House", was of such "an extraordinary character" that the "members who take part in the act may be held legally responsible". 103 U.S. at 204, 205. We would suggest at that point that participation in an illegal conspiracy with state officials in violation of federal law and the federal Constitution to carry through unconstitutional raids, arrests and seizures, in flagrant violation of the Fourth Amendment, was an act of such "an extraordinary character" as not to be "screened from punishment by the constitutional provision for freedom of debate". 103 U.S. at 205. The Court does not necessarily reach this question, however, since as we have pointed out, the acts in question are not such as to normally invoke the protection of the immunity Clause.

2. The History of Legislative Privilege and the Decisions of the English Courts Support the Conclusion That Immunity is Not Available to the Respondents.

The landmark opinions of the Court which deal with the Speech or Debate Clause anchor their analysis in the political history out of which the concept of legislative immunity was fashioned and shaped. Mr. Justice Harlan only recently reminded us that in considering the impact of the doctrine upon a given prosecution we must "look particularly to the prophylactic purposes of the clause" shaped as they were by "the long struggle for parliamentary privilege in England", *United States* v. *Johnson*, 383 U.S. at 182. Mr. Justice Frankfurter insisted that questions involving the scope of the immunity embraced by the Clause can be best understood "once they are related to the presuppositions of our political history", *Tenney* v. *Brandhove*, 341 U.S. at 372. Perhaps in no other area of constitutional analysis is the admonition so valid that a "page of history is worth a volume of logic". *New York Trust Co.* v. *Eisner*, 256 U.S. 345 at 349 (opinion of Mr. Justice Holmes). It is with these guiding comments from the Court in mind that we turn briefly to an examination of the "taproots" of the legislative privilege, 341 U.S. at 372, not in an effort to replough ground already fully explored by the Court, *United States* v. *Johnson*, 383 U.S. at 182-183, *Tenney* v. *Brandhove*, 341 U.S. at 372, *Kilbourn* v. *Thompson*, 103 U.S. at 201, 202, but in order to suggest that a refusal to immunize the acts of respondents now before the Court is as consistent with the "presuppositions of our political history" as was the decision last Term in *United States* v. *Johnson* to immunize the speech on the floor of the House of the respondent then before the Court. We would suggest that there is a complex and double-sided history to the emergence of the principle embedded in the Speech or Debate Clause which throws light upon the restrictive boundaries of the concept of legislative immunity which the Court has endeavored to spell out from *Kilbourn* to *Johnson*.

It is now well documented that the legislative privilege was "born primarily of a desire . . . to prevent intimidation by an executive and accountability before a possibly hostile judiciary", *United States* v. *Johnson*, 383 U.S. at 181, that the great formulation of legislative freedom of speech and debate of 1689 [34] was "the culmination of a long struggle for parliamentary supremacy", 383 U.S. at 178, that behind the "simple phrases" of the fundamental guarantee of legislative free speech "lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators", 383 U.S. at 178. Finally "there is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause." 383 U.S. at 182.[35] The emergence of the principle of legislative freedom of speech as a bulwark of the representatives of the people and a protection of their "independence and integrity" against an oppressive sovereign and his controlled judges, too often "lackeys of the . . . monarchs", 383 U.S. at 181, has become a well understood theme of our constitutional heritage.

But what is not as often discussed is that there were always two sides to the history of the development of

---

[34] "That the Freedom of Speech and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament," 1 W. & M. Sess. 2, c. 2.

[35] See, for a generally comprehensive history of the emergence of the legislative privilege, *Wittke, The History of English Parliamentary Privilege* (Ohio State Univ. 1921); Taswell-Longmead, *English Constitutional History*, (*11th ed. Plucknett*, 1960); Neale, *The Commons' Privilege of Free Speech in Parliament* (*Seton-Watson ed. 1924*).

legislative privilege—two contradictory and conflicting pulls which shaped and fashioned the long and tortuous history of the development of principles of law which defined and restricted the legislative privilege.[36] Professor Wittke, whose study of the history of English Parliamentary privilege has been authoritatively referred to by this Court, *United States* v. *Johnson*, 383 U.S. at 178, places the two sides to the history of the Parliamentary privilege in the following incisive manner:

> "Privilege played an important role in the great political struggles of the past centuries. At times claims of privilege were used to champion the cause of the people; there were also times when privilege became the greatest oppressor of the subject's liberty. Parliamentary privilege has frequently served as a bulwark of liberty and individual freedom, but on the other hand, in the hands of crafty, powerful and designing politicians eager to perpetuate their control and to gain the utmost personal advantage, privilege has been used as a screen for the basest oppression. There were times when privilege was used to give legal color to a Parliamentary Despotism as oppressive of individual liberty as many Kings with their claims of prerogative have been." [37]

---

[36] The Court has examined a closely related, and therefore instructive, area of the law of legislative privilege in *Watkins* v. *United States*, 354 U.S. 178 (1957). In that case the Court discussed in some detail the Parliamentary abuse of the power to punish for contempt, commenting: "The origin of privileges and contempts extends back into the period of the emergence of Parliament. The establishment of a legislative body which could challenge the absolute power of the monarch is a long and bitter story. In that struggle Parliament made broad and varied use of the contempt power. . . . It seems inevitable that the power claimed by Parliament would have been abused. Unquestionably it was."

354 U.S. at 188, 189.

[37] Wittke, *The History of English Parliamentary Privilege* (Ohio State Univ. Studies, 1921), p. 15.

Professor Wittke summarized the complex double aspect of the history of the privilege and the impact of this duality upon the development of English law defining the scope of the immunity, in this way:

> "Privilege has been both the bulwark of English liberty and the most ruthless oppressor of the rights of subjects. It has proved a means for the advancement of democracy and representative government and institutions in the hands of some, and again, it has been a tool of oppression in the hands of a corrupt, mercenary, time-serving oligarchy of politicians desirous of perpetuating their power. The proper adjustment of privilege to the other existing laws and institutions was worked out very slowly." *Wittke, supra,* at p. 206.

Professor Wittke has here highlighted an aspect of the history of the development of the parliamentary privilege which is critically illuminating in understanding the necessity for the firm enforcement by the courts of law of sharply limiting boundaries upon the concept of legislative immunity. Side by side with the danger to the independence of Parliament which resulted from an infringement upon their privileges by the executive and its courts, there emerged what Professor Wittke has termed "a far more serious aspect of the matter" for "at times parliamentary privilege became a serious menace to the liberty of the subject."[38] As long as parliamentary privilege, based upon the "lex parliamenti" was beyond all cognizance by the courts of law administering the "lex terrae", if its definition, scope and sweep, the law of privilege itself, was "known only to Parliament", [39] as long as no court had

---

[38] *Wittke, supra,* at 198. See also *Brass Crosby's Case,* 3 Wils. 199; *Regina* v. *Paty,* 2 Ld. Raym. 1105; *Sir Robert Pyle's Case,* 5 How. St. Tr. 948; *Entick* v. *Carrington,* 19 How. St. Tr. 1047.

[39] *Ashby* v. *White,* 2 Ld. Raym. 938—Opinions of Justice Gould at 941, Justice Powys at 944; *Brass Crosby's Case,* 3 Wils. 199; *Entick* v. *Carrington,* 19 How. St. Tr. 1047.

the authority to define and place limitations upon the immunities, there was nothing "to prevent unwarranted encroachments upon even the most sacred guarantees of individual liberty." [40] And as Professor Wittke points out in fact "the law of privilege was made the justification for abuses of the rights of the subject, as flagrant as those committed under the law of prerogative ever were."[41] For many years injured subjects had no redress against an indiscriminate extension of parliamentary immunities. The ordinary courts of the Kingdom were considered "inferior to the High Court of Parliament and could not pass judgment on its claims of privilege.[42] With the extension

[40] *Wittke, supra,* at 199.

[41] *Wittke, supra,* at 199. Professor Wittke cites many examples of the "Parliamentary tyranny" which resulted from unchecked extension of the parliamentary privilege. For example, in 1675, in the case of *Shirley* v. *Fagg,* 9 Com. J. 354, 6 How. St. Tr. 1162, Wittke points out that the Commons "boldly claimed for the law and custom of Parliament a power transcending the sacred guarantees of Magna Carta and the Petition of Right". *Wittke,* at p. 95. See, also, *The Case of the Earl of Shaftesbury,* 1 Modern Repts. 144 *et seq.* The famous cases of *John Wilkes and the Middlesex Election,* see May's *Constitutional History of England,* Chaps. IX, X, XI, became, in the words of Professor Wittke, "eventually a contest between the electors of England and the Crown—the latter acting through a controlled and bought House of Commons." And Wittke concludes "under the guise of privilege, the Parliament houses infringed more and more upon the fundamental rights of the electorate of England." *Wittke,* at P. 118. The cases involving Wilkes, such as *Entick* v. *Carrington,* 19 How. St. Tr. 1154, are well known for their historic contributions to the preservation of personal liberty. But in addition, as Wittke points out, the long struggles of Wilkes demonstrated dramatically "how easily a claim of privilege might be used to sanction the arbitrary proceedings of ministers and Parliament, even when a fundamental right of the subject was concerned." *Wittke,* at p. 127. See also *Alexander Murray's Case,* 1 Wils. 299; *Regina* v. *Paty,* 2 Ld. Raym. 1105; *Case of Captain Streater,* 5 How. St. Tr. 336; *Sir Robert Pyle's Case,* 5 How. St. Tr. 948.

[42] *Wittke,* at p. 199. See also *Brass Crosby's Case,* 3 Wils. 199; *Regina* v. *Paty,* 2 Ld. Raym. 1105.

of the parliamentary immunities to members' servants "the abuse of privilege became intolerable".[43] By the eighteenth century "a corrupt, time-serving Parliament had learned to use the law of privilege to punish personal enemies . . . privilege became a real danger to individual liberty . . . the common law guarantees of the subject's rights and liberties proved of no effect when matched with a Parliament, determined to vindicate its claim of privilege."[44]

In reality England had been thrown into a constitutional crisis of grave dimensions. A seemingly irreconcilable contradiction had emerged over the years between the original function of the parliamentary privilege in protecting the independence of the legislature against the Crown, and the subsequent utilization of the legislative privilege as a means of perpetuating a parliamentary tyranny destructive of the rights of individual subjects. The ultimate resolution in the English system of this constitutional dilemma lay in the slow evolution of legal definitions and limitations upon the exercise of legislative privilege, enforceable by the courts of law, which would at the same time protect the essential legislative right to freedom of speech while safeguarding the fundamental liberties of individuals.[45] The law of the legislative privilege which has emerged in England reflects this effort to resolve the contradiction

---

[43] *Wittke*, at p. 200. See also *Burdett* v. *Colman*, 14 East. 163; *Mr. Coke's Servant*, 1 Hats. Pr. 112; *Lark's Case*, 1 Hats. Pr. 18.

[44] *Wittke*, at p. 201.

[45] As Professor Wittke comments: "Occasionally someone caught a faint glimpse of the ultimate solution, but it took years to realize it in practice. Gradually it must have dawned upon men's minds to inquire why privilege alone should remain unlimited and undefined by law, long after the royal prerogative and the rights and liberties of the people had become fixed and circumscribed by acts of Parliament and decisions of the common law courts." *Wittke*, at p. 203. See also *Prynne, Brief Register*, IV, 695; *Ashby* v. *White*, 2 Ld. Raym. 938, 950.

engendered by the two sides to the history of the concept, through restricting the immunities to those situations which truly serve the end of protecting the freedom of speech and independence of the legislators while rejecting all efforts to utilize the privilege to immunize actions destructive of the liberties of citizens.

The first great expression of what was ultimately to be the English judicial resolution of the historical dilemma was the landmark opinion of Lord Holt in the case of *Ashby* v. *White*, 2 Lord Raymond 938 at 950 (1700). This opinion has been called "the first clear exposition of what might be termed the modern view of parliamentary privilege."[46]

In this opinion Lord Holt maintained that a dividing line must be drawn by the courts of law between the legitimate claims of parliamentary privilege and the fundamental rights of citizens to secure reparations for injuries received by applying for relief to the courts of law. Lord Holt announced what was then a new doctrine, that there are certain fundamental rights of the subject, guaranteed under the common law which cannot be abridged or altered even under the claim of parliamentary privilege. Furthermore, Lord Holt argued that anything incompatible with the rights of the people or anything depriving them of their basic right to secure a remedy for injuries received from a court of law could not be a privilege of the Parliament.[47]

This incisive analysis of Lord Holt was not to become the solution adopted by the English system in reconciling

---

[46] *Wittke, supra*, at p. 64.

[47] See *Wittke, supra*, at pp. 64-5 for a discussion of Chief Justice Holt's opinion in *Ashby* v. *White, supra*. Lord Holt's opinion in *Regina* v. *Paty, supra*, is equally interesting. See, for example, his statement at 2 Ld. Ravm. 1113-1114: "The privileges of the House of Commons are well known, and are founded upon the law of the land, and are nothing but the law. . . . And if they declare themselves to have privileges, which they have no legal claim to, the people of England will not be estopped by that declaration."

the two-sided experience of history with the operation of the parliamentary privilege until almost one hundred and fifty years later in the celebrated cases of *Stockdale* v. *Hansard* (1837-1842).[48]

These cases, involving a claim of privileged immunity from a suit for libel by the public printer, established the following principles of law which reflected Lord Holt's concern with adjusting the true privileges of the House with the necessity for preserving the fundamental liberties of the citizen:

1. The courts of law have the duty and responsibility of defining the limits and scope of asserted legislative privileges and immunities. The concept that the Parliament alone has the power to define its own privileges would concede to the legislature a limitless and arbitrary power over the rights of individuals, for as Lord Chief Justice Denman said in his opinion, "in truth, no practical difference can be drawn between the right to sanction all things under the name of privilege, and the right to sanction all things whatever, by merely ordering them done."[49]

---

[48] Professor Wittke explains the long period before the acceptance of Lord Holt's analysis of the parliamentary privilege in the following way: "Between 1701 and 1837, Holt's theory was disregarded completely, save in the arguments of a few able lawyers, and was never advanced by Parliament or the courts during this period as a real solution for the problems of privilege and its relation to the common law. These years include the reign of the Whig Oligarchy, still resting serenely on the prestige which the Glorious Revolution had brought them. Parliament was their stronghold, and they clung tenaciously to their power. It was unreasonable to expect them to support a principle that would rob them of their arbitrary powers in Parliament, and bring them under the restraints of the law. Privilege of Parliament proved one of the convenient aids in maintaining and prolonging an autocratic rule." Wittke at p. 205.

[49] *Stockdale* v. *Hansard*, 9 AD. & E. 1 at 147.

2. The legitimate scope of the legislative privilege of immunity must be tested by whether the act sought to be immunized "is indispensably necessary for the performance of the duty they are employed in, and also that it has been uniformly allowed."[50] Or, as Justice Coleridge placed it, the privilege of legislative immunity is permitted only where required "for the effective discharge of those duties which by the Constitution are cast upon the House of Commons."[51] *Cf. Tenney* v. *Brandhove, Kilbourn* v. *Thompson, supra.*

3. No legislative immunity attaches to a "known and undoubted breach of the law," for neither "House of Parliament can authorize any person to commit with impunity a known and undoubted breach of the law".[52] While members of the House may not be held liable "on account of the orders issued by them as such members" *cf. Kilbourn* v. *Thompson, supra,* any person whosoever participating in the illegal actions is liable in an action at law for damages, because "there is no wrong without a remedy; and where can the remedy be but by action in a Court of Law against those who have done the injury?"[53]

---

[50] *Stockdale* v. *Hansard,* 9 AD. & E. 1 at 240.

[51] *Stockdale* v. *Hansard,* 9 AD. & E. 1 at 218.

[52] *Stockdale* v. *Hansard,* 9 AD. & E. 1 at 188.

[53] The full discussion of Justice Patteson on this question is instructive in respect to the issues involved in the present case:

> "With respect to the first question, it has not been contended in argument that either House of Parliament can authorize any person to commit with impunity a known and undoubted breach of the law. Extravagant cases have been sometimes put, illustrating the impossibility of maintaining such a proposition. It has been answered truly, that it is not decent or respectful to those high assemblies to suppose that such extravagant cases should arise. But less extravagant cases have arisen in which

Applying these principles to the case at bar the English court held that the parliamentary immunity did not apply to those individuals who published the alleged libelous ma-

---

both Houses of Parliament have confessedly exceeded their powers in punishing persons for trespasses on the lands of members, and other matters wholly without their jurisdiction, but which they have treated as questions of privilege. And, though no instance has been cited of any action having been brought, but, on the contrary, the persons proceeded against have very commonly submitted to the illegal treatment they have met with, yet surely the maxim of law must apply, viz. that there is no wrong without a remedy; and where can the remedy be but by action in a Court of Law against those who have done the injury? If it be once conceded that either House of Parliament can make an illegal order, it must necessarily follow that the party wronged may have redress against those who carry such illegal order into effect; and how can he have such redress but by action at law? Great difficulties may undoubtedly arise in distinguishing between acts done in the House, and out of the House under orders given in the House, and in determining against whom such action would lie. It is clear that no action can be maintained for anything said or done by a member of either House in the House: and the individual members composing the House of Commons, whether it be a Court of Record or not, may, like other members of a Court of Record, be free from personal liability on account of the orders issued by them as such members. Yet, if the orders themselves be illegal, and not merely erroneous, upon no principle known to the laws of this country can those who carry them into effect justify under them. A servant cannot shelter himself under the illegal orders of his master. Nor could an officer under the illegal orders of a magistrate, until the Legislature interposed and enabled him to do so. The mere circumstance, therefore, that the act complained of was done under the order and authority of the House of Commons, cannot of itself excuse the act, if it be in its nature illegal; and it is necessary, in answer to an action for the commission of such illegal act, to show, not only the authority under which it was done, but the power and right of the House of Commons to give such authority." 9 AD. & E. 1 at 188-190.

terials, although the printing had in fact been ordered by the Commons itself.[54]

It has been said that as a result of the almost five centuries of conflict, culminating in the *Stockdale* v. *Hansard* cases, "England now has an all-embracing law of the land which protects the subject and the just privileges of Parliament as well" and that "Parliamentary privilege exists today only under the rules and limitations of the law."[55] The ultimate English judicial resolution of the limits and scope of legislative immunity reflected in the *Stockdale* v. *Hansard* cases which protect the fundamental liberties of the citizen from the abuses of an arbitrary legislative tyranny, is in the deepest sense of the word also protective of the legislative privilege itself. For as Justice Coleridge stated in concluding his opinion in *Stockdale* v. *Hansard*:

> "The privileges of the House are my own privileges, the privileges of every citizen in the land. I tender them as dearly as any member possibly can: and, so far from considering the judgment we pronounce as invading them, I think that by setting them on the foundation of reason, and limiting them by the fences of the law, we do all that in us lies to

---

[54] In the case of *Rex* v. *Creevy*, 1 M. & S. 273, the defendant was a member of Parliament who caused to be circulated outside of Parliament a publication originally printed for Commons. The copies circulated contained matter injurious to the character of an individual. The defendant was held accountable by a jury for publication of the libelous material even though he would not have been required to answer for it had he simply made the statements in Commons and not caused them to be widely publicized and circulated. See also *Long* v. *Ansell*, 293 US 76 (1934). In that case, a Senator of the United States was charged with publishing, in the District of Columbia, libelous articles which he distributed widely. This Court held that the Senator was not immune from service of process to answer for his conduct in a civil defamation action. See also *McGovern* v. *Martz*, 182 F. Supp. 343 (DC DC 1960), (no absolute privilege for republication of material inserted in Congressional Record).

[55] *Wittke* at pp. 206, 207.

secure them from invasion, and root them in the affections of the people."[56]

• • •

The English history of legislative immunity and the ultimate English judicial resolution of the complex and contradictory influences involved in the emergence of the parliamentary privilege are of course deeply related to the "presuppositions of our political history" critical to an understanding of the meaning and purpose of the Speech or Debate Clause. *Tenney* v. *Brandhove,* 341 U.S. at 372.[57] We would suggest that the limitations and boundaries to the concept of legislative immunity which this Court has emphasized from *Kilbourn* to *Johnson* reflect the lessons of history—that the legislative immunity must not be permitted ever again to become "the greatest oppressor of the subject's liberty", or a "screen for the basest oppression."[58] The firm rejection by this Court of respondents' claim of legislative immunity for their participation in a conspiracy with state officials to bring about illegal raids, arrests and the seizure of the property of citizens would, in the words of Justice Coleridge in *Stockdale* v. *Hansard,* firmly preserve the true purpose of the privileges embedded in the Speech or Debate Clause "and root them in the affections of the people" by "setting them on the foundation of reason, and limiting them by the fences of the law".

---

[56] *Stockdale* v. *Hansard,* 9 AD. & E. 1 at 243.

[57] See the comment of Mr. Justice Miller in *Kilbourn* that the decision in *Stockdale* v. *Hansard* is a "sound statement of the legal effect of the Bill of Rights and of the parliamentary law of England" and that "it may be reasonably inferred that the framers of the Constitution meant the same thing by the use of language borrowed from that source". 103 US at 202.

[58] *Wittke, supra* at p. 15.

3. The Solicitor-General Appears to Agree That No Immunity Would Protect Respondents as Parties to the Conspiracy Affecting the October 4 Raids.

It is perfectly clear that under the controlling decisions of this Court, the Speech or Debate Clause, as interpreted within the context of the "presuppositions of our political history", *Tenney* v. *Brandhove*, 341 U.S. at 372, does not permit a mantle of immunity to be placed over the complained of acts of the respondents. In fact, in this Court, the Solicitor-General does not suggest, contrary to the position of the respondents below, that the charge of participation in the conspiracy to effectuate the illegal raids and seizures of October 4th is protected by any concept of legislative immunity. Brief for Respondents in Opposition, pages 10, 11.

In the Court of Appeals, the respondents argued alternatively that (1) the petitioners had failed to put forward a serious claim that the respondents were parties to a knowing concert of action with the state officials (R. 105), and (2) that even if the respondents "did participate or conspire in the acquisition of the records by means of the search and seizure . . . the doctrine of immunity would be an absolute defense", Brief for Appellees below, page 35. The Court of Appeals rejected respondents' first contention, stating directly, "were only the former involved, we might have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial" (R. 105), and rested its affirmance wholly on the assumption that the concept of legislative immunity protected respondents from accountability in damages for the actions charged to them in the complaint (R. 105).

In this Court, however, the Solicitor-General appears to have abandoned any contention that the Speech or Debate Clause could conceivably immunize the respondents from the charge of participation in the conspiracy with the state officials to bring about the October 4th raids, arrests, searches and seizures. The Solicitor-General's sole re-

sponse to the charge of participation in the conspiracy concerning the October 4th raids now appears to be a contention that the Court of Appeals erred when it found that "we might have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial", Brief for Respondents in Opposition, pages 9, 10, see in particular footnote 4.[59] The Solicitor does not urge, as the respondents did below, that even if there were disputed issues of fact as to whether they "were parties to a knowing concert of action with the state officials" (R. 105), legislative immunity would insulate such conduct from scrutiny in a court of law. He prefers instead to rest his argument in respect to the charge of participation in the conspiracy solely upon an effort to persuade this Court to overturn the Court of Appeals' factual determination that on the record with regard to whether respondents were parties to a "knowing concert of action with the state officials" there are "disputed issues of fact requiring exploration and resolution by means of a trial" (R. 105).[60] Thus the

---

[59] The Solicitor-General here states, "With regard to respondents' alleged participation in a conspiracy, the court of appeals found that 'we might have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial' (Pet. App. 5a). As we show, however, petitioners' failure either to contradict respondents' affidavits on this score or to explain their failure to do so fully justified the district court's action in granting summary judgment under Rule 56, F.R. Civ. P."

[60] The apparent concession that there is no issue of legislative immunity in respect to the charge of participation in the conspiracy concerning the Oct. 4th raids is highlighted by the Solicitor's careful statement that "Finally, to the extent that petitioners' complaint may have rested, *not on respondent's alleged complicity in the October 4 searches*, but on the fact that respondents executed subpoenas for the seized material without prior authorization by the subcommittee, we submit that the court of appeals correctly held that the respondents' conduct was undertaken in their official capacity and provides no basis for recovery in tort" (emphasis added). Brief for Respondents in Opposition, pp. 10, 11.

Solicitor appears to suggest that in respect to the charge of "alleged complicity in the October 4 searches" there is no issue of immunity, and that this question may arise only to the extent that that complaint rests *"not on"* this complicity, but on the use of the unauthorized subpoenas. Brief for Respondents in Opposition, pages 10, 11. We discuss subsequently why the use of the unauthorized subpoenas by the respondents may not invoke any, even limited, immunity response. See pages 70 *et seq., infra. Cf. United States* v. *Johnson, supra.* But the simple fact of the matter is that the complaint *does* rest upon a charge of knowing concert of action with the state officials in respect to the October 4th searches (R. 2-12), and the Court of Appeals *has* found that there are disputed material facts as to respondents' participation in this knowing concert of action requiring a trial (R. 105). Accordingly, it would seem that the Solicitor's only defense in this Court to the main thrust of the complaint appears to be the extraordinary suggestion that the Court of Appeals' determination that there are disputed issues of fact requiring exploration and resolution by trial ought to be overturned by this Court. We discuss the propriety and soundness of this suggestion in Point III, *infra,* at pages 95 *et. seq.,* where we indicate that the factual conclusion of the Court of Appeals as to the existence of disputed issues requiring resolution by trial is fully supported on the record. However, it would appear that at this stage of the litigation, the Solicitor-General now seems to agree that no mantle of immunity can attach to the actions of respondents who stand charged with participating, together with state officials, in a conspiracy under color of state law to plan and contrive illegal raids,

arrests, searches and seizures, in violation of the Fourth Amendment. *Cf. Wheeldin* v. *Wheeler*, 373 U.S. 647 (1963).[61]

4. The Recent Decisions in the Fifth Circuit in the Louisiana Branch of This Litigation Support the Conclusion That No Immunity Attaches to Respondents As Parties to the Conspiracy to Bring About the October 4 Raids.

The recent decision by the Court of Appeals for the Fifth Circuit, *Pfister* v. *Arceneaux* (No. 22562, Nov. 14, 1966), Appendix E to this Brief, reflects the same perceptions which underlie the apparent agreement of the Solicitor-General in this Court—that no mantle of legislative immunity may be placed over a charged participation in a conspiracy to carry through illegal raids, arrests, searches and seizures.

The opinion of Circuit Judge Wisdom focuses on the central problem in the present case. The third-party defendants in the Louisiana branch of this litigation (see Statement of the Case, p. 21, *supra*) were members of the Louisiana Joint Legislative Committee. They sought dismissal of or judgment upon the third-party complaint on the theory that their activities as Committee members were all protected by the doctrine of legislative immunity, relying upon this Court's decision in *Tenney* v. *Brandhove*, *supra*. Judge Wisdom found for the Circuit Court that there was a genuine issue as to a material fact present in the record which would preclude summary judgment. Appendix E. This issue of fact was relevant to whether the Committee members were involved in any way in the planning, preparation or operation of the October 4th

[61] In *Wheeldin*, the Solicitor-General conceded in this Court that the respondent Wheeler, a staff investigator for the House Committee on Un-American Activities charged with tort liability for damages alleged to flow from the service of an unauthorized subpoena, was "not acting sufficiently within the scope of his authority to bring the doctrine [immunity] into play". 373 US at 647. See discussion *infra* at pp. 71 *et. seq.*

raids.[62] In turn, Judge Wisdom pointed out that this question of fact was directly relevant to the central issue of legislative immunity pleaded by the third-party defendants, for as Judge Wisdom emphasized, this "has a serious bearing on the question as to whether Pfister and the other members of the Committee were 'acting in the sphere of *legitimate* legislative activity' " (emphasis added by Judge Wisdom). Thus the conclusion of the Circuit Court was clear. If there is a disputed issue as to participation in the illegal October 4th raids requiring resolution by trial, there is inevitably a disputed issue as to the propriety of a defense of legislative immunity, since such a defense is available only where the legislators are acting in the sphere of *legitimate* legislative activity. The inference of the court is obvious. Participation in illegal raids, arrests and seizures in violation of the Fourth Amendment is simply not "legitimate" legislative activity.

This is a conclusion which, as we have seen, is impelled not only by the decisions of this Court, not only by the "suppositions of our political history", *Tenney* v. *Brandhove*, 341 U.S. at 372, but by the most fundamental axioms of our system of government. The command of the Fourth Amendment reflects considerations which go to the heart of a system of ordered law. This last term the Court saw fit to remind us of these words of Mr. Justice Brandeis in *Olmstead* v. *United States*:

> "Decency, security and liberty alike demand that government officials shall be subject to the same rules of conduct that are commands to citizens. In

---

[62] The contested issue of fact as to the Committee members included the accuracy of their statements that "they did not authorize the raids and in fact knew nothing about them before they were carried out". Appendix E. The court found that there was sufficient doubt on this question to foreclose summary judgment, citing *National Screen Service Corp.* v. *Poster Exchange, Inc.*, 5 Cir. 1962, 305 F.2d 647, 651, and *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464.

> a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously", 277 U.S. 438, 485. See *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

If this is the thrust of the Fourth Amendment, it is of course inconceivable that participation by a legislator in the flagrant violation of the Amendment could ever, in our system of government, be considered to be "legitimate" legislative activity. Any support to such an extraordinary proposition would undermine the first principles of the Republic that this is "a government of laws and not of men". *Marbury* v. *Madison*, 1 Cranch 137. If an American court were ever to say that participation in the violation of the commands of this Amendment was, in any sense at all, a "legitimate" legislative activity, then in Mr. Justice Brandeis warning words the very "existence of the government will be imperilled", 277 U.S. at 485.

These considerations lie behind the recent decision of the Fifth Circuit in *Pfister* v. *Arceneaux* and, we suggest, may well lie behind the Solicitor's apparent agreement that no immunity may attach to a claim of participation in a conspiracy to contrive raids and seizures in violation of the Fourth Amendment. The conclusions of the Fifth Circuit are of course highly relevant and persuasive in the present case. Here, as in the Louisiana branch of the litigation, the Court of Appeals has also found "difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial" as to whether the respondents were "parties to a knowing concert of action with the state officials" (R. 105). And here, as in *Pfister* v. *Arceneaux*, the conclusion is likewise inescapable that this has "a serious bearing on the question whether [the respondents] were 'acting in the sphere of *legitimate* legislative activity', which would entitle them to immunity", Appendix E. This conclusion is inescapable because the

inference underlying the conclusion is unanswerable under the premises of our system of government—that participation in illegal raids, arrests, searches and seizures in violation of the Fourth Amendment may never be characterized for any purpose as "legitimate" legislative activity. As in *Pfister* v. *Arceneaux*, these respondents should be required to stand trial on the charges that they were parties to a knowing concert of action with state officials to instigate and carry through the illegal raids, searches and seizures of October 4th.

5. Respondents' Unauthorized Use of the Subpoena Power in the Course of the Conspiracy Does Not Justify the Invocation of the Doctrine of Legislative Immunity.

The Solicitor-General suggests that to the extent that the complaint does not rest upon "respondent's alleged complicity in the October 4 searches," but "on the fact that respondents executed subpoenas for the seized material without specific prior authorization by the Subcommittee" this use of the subpoena power "was undertaken in their official capacity and provided no basis for recovery in tort" Brief for Respondents in Opposition, pp. 10, 11.[63] This suggestion is in direct conflict with the previous Solicitor-

[63] It should be pointed out as a threshold consideration that even if the Solicitor-General's suggestion was sound—that immunity attaches in some way to the use of the unauthorized subpoenas, see *contra, Wheeldin* v. *Wheeler*, 373 U.S. 656, [concession of Solicitor-General that under allegations of the utilization of an unauthorized House Committee on Un-American Activities subpoena a respondent "was not acting sufficiently within the scope of his authority to bring the doctrine into play", 373 U.S. at 647, and Brief for Respondents in the Supreme Court, *Wheeldin* v. *Wheeler*, at p. 31] summary judgment would have been erroneous since at best under *United States* v. *Johnson, supra*, the trial of the conspiracy charge would have had to have been held, "purged" only of elements "offensive to the Speech or Debate Clause." See discussion, *supra*, at pp. 39 *et seq.*

General's own concession before the Court in *Wheeldin* v. *Wheeler*, 373 U.S. 656 (1963), in an identical situation, and is contrary to the teaching of recent decisions of this Court affirming the fundamental importance of minimal requirements of authorization in Congressional investigative activities in the areas of the protected liberties of the people. *Cf. Gojack* v. *United States*, 384 U.S. 702, (1966).

(a) In *Wheeldin* v. *Wheeler*, 373 U. S. 656, the Solicitor-General took the position before this Court that the unauthorized use of the subpoena power by an investigator for the House Committee on Un-American Activities required a concession by him that the respondent committee investigator was "not acting sufficiently within the scope of his authority to bring the [immunity] doctrine into play" 373 U. S. at 647. This concession by the Solicitor-General in *Wheeldin* would seem to be dispositive here of any contention that the unauthorized use of the subpoena power by the respondents was in any way immunized.

Wheeldin involved an action for damages for injuries caused to a petitioner by the service of a House Committee on Un-American Activities subpoena upon him. The complaint alleged that the subponea was signed in blank by the Committee Chairman and that its service upon the petitioner was never authorized by the Committee. 373 U. S. at 648. The Court of Appeals sustained the District Court's dismissal of the action on the sole ground that the respondent was protected by the immunity doctrine. However, in this Court, the Solicitor-General conceded that under these allegations the respondent was "not acting sufficiently within the scope of his authority to bring the doctrine into play". 373 U. S. at 647. Both the opinion of the Court by Mr. Justice Douglas, 373 U. S. at 651, and the dissenting opinion of Mr. Justice Brennan, joined by the Chief Justice and Mr. Justice Black, 373 U. S. at 653, agreed with the Solicitor-General that the immunity doctrine could not be invoked under these allegations.

The *Wheeldin* facts concerning the use of the subpoena power are strikingly identical to the present record. The October 4th subpoenas were signed in blank by the Chairman of the Committee (R. 32). They were filled in and issued by the respondents without the knowledge of or authorization of the Subcommittee or the full Committee (R. 33, 34). The Solicitor General here concedes that these subpoenas "had not been authorized by the Subcommittee prior to the actions taken by respondents." Brief for Respondents in Opposition, p. 8. There is no suggestion in this record that the Subcommittee or the Committee ever "attempted to delegate the Committee's subpoena power" to the respondents, cf. 373 U. S. at 648, even if such a delegation had been permitted by the Committee's own rules.[64] The parallel to *Wheeldin* is striking.[65]

---

[64] Subpoenas issued by a single member of the Subcommittee on Internal Security without the prior authorization of the Subcommittee are null and void as violative of the Committee's own rules, even if the single member issuing the subpoena is the Chairman. *Liveright* v. *United States*, 347 F. 2d 473 (C.A. D.C. 1965); *Shelton* v. *United States*, 327 F. 2d 601 (C.A. D.C. 1963). These recent decisions of the Court of Appeals for the District of Columbia squarely hold that subpoenas issued by the Internal Security Subcommittee must be authorized by the full Subcommittee. The Court of Appeals holds in *Liveright* that a subpoena issued by respondent Eastland, as Chairman of the Subcommittee, after consultation with the Chief Counsel of the Committee, is invalid as violative of the Committee's own rules. The Court points out that the Committee rule requiring all decisions on subpoenas to be made by the Subcommittee and not an individual member, "served to protect the right of all persons to be free from unnecessary invasions of their privacy" 347 F. 2d at 475. The Court of Appeals relied upon its own previous decision in *Shelton*, and this Court's decision in *Yellin* v. *United States*, 374 U.S. 109. In *Shelton* the Court of Appeals referred to this Court's decision in *Cudahy Packing Co. of Louisiana* v. *Holland*, 315 U.S. 357, 363, stating that the authority "to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use."

[65] The lower court suggests that Wheeldin is inapposite here because "unlike *Wheeldin*, the record before us shows without dispute

The conclusion is compelling that the unauthorized use of the subpoena power here by the respondents was, as in *Wheeldin*, "not . . . . sufficiently within the scope of their authority" to bring the immunity doctrine into play. Or, to put it in terms more familiar to the vocabulary of the legislative privilege, the utilization of admittedly unauthorized subpoenas is not "legitimate legislative activity." *Tenney* v. *Brandhove, supra.*[66]

---

that the subpoena was expressly authorized in the first instance by the Chairman of the legislative committee . . ." (R. 107). Apart from the fact that the Chairman had no authority to authorize the subpoena, *Shelton* v. *United States, Liveright* v. *United States,* both *supra,* in *Wheeldin* it is quite clear that the subpoena was not only signed in blank by the Chairman, but that the Chairman had seen a list of prospective subpoenaees in advance and had agreed to the respondents issuing subpoenas to those named. Reply Brief for Petitioners in the Supreme Court, pp. 10-11. Moreover, at the contempt trial of Wheeldin, the District Court found that the Chairman had, in fact, directed the respondent Wheeler to subpoena Wheeldin. Brief for Respondents in the Supreme Court, at p. 23.

[66] The Court's decision in *Wheeldin* is instructive in other respects here. The majority opinion of Mr. Justice Douglas, after disposing of the immunity issue and asserting the propriety of federal jurisdiction under *Bell* v. *Hood,* 327 U.S. 678, held that no federal cause of action was stated since (1) the "facts alleged do not establish a violation of the Fourth Amendment", 373 U.S. at 650, and (2) the Civil Rights Acts were not available since respondents were not acting "under color" of state law. Here, of course, the complaint clearly states facts establishing a violation of the Fourth Amendment, the violation having already been found as a matter of law by the Louisiana state courts, see Statement of Facts, *supra* at pp. 8, 9 and the respondents are charged with acting in concert with state officials under color of state law. *Cf. United States* v. *Price, supra.* The dissenting Justices in *Wheeldin,* Mr. Justice Brennan, the Chief Justice and Mr. Justice Black, would have sustained a federal cause of action in tort even absent classic Fourth Amendment allegations. 373 U.S. at 653. It would seem that had the *Wheeldin* complaint adequately alleged a Fourth Amendment violation, the Court would have sustained the complaint.

(b) Both the Solicitor-General and the lower court attempt to suggest that the Subcommittee's subsequent resolution of November 14th, inserting the seized material "into the record of the Subcommittee" (R. 36), in some manner serves as a retroactive ratification of the subpoenas sufficient to bring the unauthorized use of the subpoena power back within "the sphere of legitimate legislative activity." Brief for Respondents in Opposition, at p. 11.

In the first place, the so-called resolution of November 14 very carefully does not even purport to "ratify" or "approve" the issuance of the October 4 subpoenas. It merely directs that the seized materials be inserted in the record, photostated and "returned promptly" to the Louisiana officials (R. 36, 37). Furthermore, there is even some question in the record about the existence of any such formal Subcommittee action on November 14.[67] But in

---

[67] At the hearing on the motion for summary judgment petitioners moved, pursuant to Rule 56 subd. (f) of the Federal Rules of Civil Procedure for "a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had" based upon information appearing in the press on February 6, 1965, that Senator Kenneth B. Keating (R., N.Y.), a member of the Internal Security Subcommittee had recently sent a letter to respondent Eastland protesting any subpoena of the SCEF records and saying that "no such action should be taken without full discussion of the Subcommittee" (R. 30, 31). At the hearing itself before the District Court, petitioners submitted an affidavit to the court in support of the motion, pursuant to Rule 56(f), for a continuance to permit a deposition to be taken of or an affidavit to be obtained from Senator Keating. The affidavit of counsel had attached to it a copy of Senator Keating's letter of January 30, 1964 sent to respondent Eastland, referred to in the newspaper story of February 6 (R. 31). The District Court refused to entertain the affidavit with the attached letter of Senator Keating and accordingly this second affidavit and the Senator's letter are not a part of the formal record in this case. In light of the great reliance now placed by the respondents upon the purported resolution of November 14, it would seem that it was clear error for the District Court to refuse to allow Senator Keating's letter into the record, or permit time to take his deposition.

any event, it is now perfectly clear that retroactive authorization of an investigation or a subpoena issued by an investigative committee will not be tolerated. *Gojack* v. *United States,* 384 U. S. 702, 715, fn. 12; *United States* v. *Rumely,* 345 U. S. 41, 48; *Shelton* v. *United States,* 327 F. 2d 601 (C. A. D. C. 1963). In *Gojack* v. *United States,* this Court only last Term rejected a contention that subsequent actions taken by the full House Committe on Un-American Activities could be treated as "retroactive authorization of the investigation and definition of the delegated authority" 384 U. S. at 715.[68] See also *United States* v. *Rumely,* 345 U. S. at 48. In *Shelton* v. *United States, supra,* the Court of Appeals for this District of Columbia, in an opinion by Circuit Judge Wright, specifically refused to permit a retroactive authorization of a subpoena issued without authorization by the Senate Subcommittee on Internal Security. Judge Wright's conclusion in rejecting the Government's argument that the unauthorized subpoena had been ratified by later Committee action, is directly relevant here:

> "As its final argument on this point, the Government says that, in any event, the Subcommittee, by its presence at the time Shelton refused to answer the questions, ratified his appearance as a witness. We do not agree. Shelton had a right under the Subcommittee charter to have the Subcommittee responsibly consider whether or not he should be

---

[68] Mr. Justice Fortas put the question this way in his opinion for the Court in *Gojack*:

> "The action of the full Committee in reporting petitioner's contempt to the House, and the House's action in certifying the contempt to the United States Attorney for prosecution, cannot be taken as retroactive authorization of the investigation and definition of the delegated authorization of the investigation and definition of the delegated authority. Petitioner's 'duty to answer must be judged as of the time of his refusal.' *United States* v. *Rumely,* 345 U.S. 41, 48, 73 S. Ct. 543, 547."

> subpoenaed before the subpoena issued. Shelton's rights were abridged when the subpoena was issued without Subcommittee authorization. Cf. Christoffel v. United States, 338 U.S. 84, 69 S. Ct. 1447, 93 L. Ed. 1826 (1949)."

The unauthorized use of the subpoena power at the time of its use by these respondents was admittedly not "legitimate legislative activity," *Tenney* v. *Brandhove, supra,* and cannot any more be "retroactively" transformed into "legitimate legislative activity" than could the subpoena of Gojack in an unauthorized investigation have been validated by a "retroactive authorization," *Gojack* v. *United States,* 384 U. S. 715.[69]

(c) The sharp rejection of any concept of retroactive authorization restated in *Gojack* this last Term, reflects the deepening concern of this Court in recent years to protect the fundamental liberties of citizens from the encroachments of unauthorized and uncontrolled legislative investigations enforced by compulsory process. The lower court treats the concededly unauthorized use of the subpoena power by the respondents as if it were a mere technicality to be quickly cured by some generalized later action of the Committee. In the opinion of the lower court, "acting first and receiving authorization later, does not, under the facts of this case, put their actions beyond the pale of

---

[69] The requirement of full Committee action in legislative investigations serves important policy considerations. See, for example, *Report on Congressional Investigations* by Special Committee on Individual Rights of the American Bar Association (1954, p. 27):

> "We are dealing with investigations by committees in the interests of Congress and the nation, not investigations by individuals. Abdication by the committee in favor of its chairman blurs this whole concept, encourages arbitrary action, and allows the public to blame Congress for the errors thus permitted with its authority and has proved to be undesirable. Committee responsibility is essential and it can be maintained only if the majority of the committee join in making the principal decisions."

official legislative activity, at least for purposes of the immunity doctrine", (R. 107). But this conclusion is wholly inconsistent with the fundamental concerns underlying the repeated insistence of this Court that the use of compulsory process to enforce legislative investigative activity in the protected areas of the First Amendment must be carefully circumscribed and controlled by minimal requirements of valid authorization. As the Chief Justice wrote in *Sweezy* v. *New Hampshire,* 354 U. S. 234: "It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas of freedom of speech or press, freedom of political association, and freedom of communication of ideas . . ." 354 U. S. at 245.

This firm insistence upon a showing of clear authorization as a minimal protection against the abuses of an investigating power which functions as a "roving commission", *Gojack* v. *United States,* 384 U. S. at 715, "probing at will without relation to existing need", *DeGregory* v. *Attorney General of New Hampshire,* 383 U. S. 825, is at the core of this Court's decisions from *Watkins* v. *United States,* 354 U. S. 200, to *Gojack* v. *United States,* this last Term. The requirement of authorization prior to the intrusion of compulsory process into the sensitive areas of the First Amendment is no minor technical question. It goes to the very heart of "the responsibility of the Congress; in the first instance, to insure that compulsory process is used only in furtherance of a legislative purpose" *Watkins* v. *United States,* 354 U. S. at 201. It is "an especially vital consideration in assuring respect for constitutional liberties", *Watkins* v. *United States,* 354 U. S. at 205.

The understanding that the requirement of authorization for compulsory process is a fundamental minimal barrier against legislative intrusion into constitutionally in-

sulated areas of the liberties of citizens underlies the Court's opinion in *Watkins* v. *United States, supra.* The Court, in *Watkins,* recognizing that "abuses of the investigative process may imperceptibly lead to abridgement of protected freedoms", 354 U. S. at 197, resulting in a "ruthless exposure of private lives in order to gather data that is neither desired by the Congress nor useful to it", 354 U. S. at 205, insisted as a first principle, "an essential premise", that investigations enforced by compulsory process be specifically authorized by the Congress and the Committee. This insistence rests, the Chief Justice pointed out, upon the recognition that "it is the responsibility of the Congress, in the first instance, to insure that compulsory process is used only in furtherance of a legislative purpose" 354 U. S. at 201. Otherwise the investigatory power can be "inflated into a general power to expose where the predominant result can only be an invasion of the private rights of individuals" 354 U. S. at 200. Such an exercise of the investigating power would be wholly beyond the constitutional power of the legislature since "there is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress" 354 U. S. at 197. As the Court placed the question in broad perspective, "Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible" 354 U. S. at 197. Cf. *Gojack* v. *United States,* 384 U. S. at 711, fn. 9.

The insistence upon authorization as a precondition to the utilization of compulsory process in aid of the investigative power thus places upon the Congress the first responsibility of insuring that this utilization of compulsory process in aid of the investigatory power remains within the

confines of lawful, constitutional legislative power. In short, the requirement of authorization places upon the Congress the responsibility of first drawing the line between "legitimate legislative activity", cf. *Tenney* v. *Brandhove,* 341 U. S. at 376, and activity wholly outside the sphere of its constitutional limitations. And, as the Court warned in *Watkins,* the consequences which flow from the failure to insist upon authorization in the use of compulsory process in these critical areas are "manifold" 354 U. S. at 204. Absence of specific authorization means that "in deciding what to do with the power that has been conferred upon them, members of the Committee may act pursuant to motives that seem to them to be the highest. Their decisions, nevertheless, can lead to ruthless exposure of private lives in order to gain data that is neither desired by the Congress nor useful to it" 354 U. S. at 205. But the vice of lack of authorization is even "more important and more fundamental than that" 354 U. S. at 205. Here, the Chief Justice focuses upon the very center of the problem. Lack of specific authorization for the use of compulsory process "insulates the House that has authorized the investigation from the witnesses who are subjected to the sanctions of compulsory process" 354 U. S. at 205. This results in "a wide gulf between the responsibility for the use of investigative power and the actual exercise of that power" 354 U. S. at 205. And as the Chief Justice points out, "this is an especially vital consideration in assuring respect for constitutional liberties" for "protected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need" 354 U. S. at 205.

The conclusions of the court in *Watkins* are most appropriate here. In words which apply directly to the suggestion of the lower court—that the unauthorized use of the subpoena power by these respondents remains "within the mainstream of legislative effort" (R. 107)—the Chief

Justice summed up in this way the critical importance of the requirement of proper authorization as a condition precedent to the utilization of compulsory process in the field of congressional investigations:

> "We are mindful of the complexities of modern government and the ample scope that must be left to the Congress as the sole constitutional depository of legislative power. Equally mindful are we of the indispensable function, in the exercise of that power, of congressional investigations. The conclusions we have reached in this case will not prevent the Congress, through its committees, from obtaining any information it needs for the proper fulfillment of its role in our scheme of government. The legislature is free to determine the kinds of data that should be collected. It is only those investigations that are conducted by use of compulsory process that give rise to a need to protect the rights of individuals against illegal encroachment. That protection can be readily achieved through procedures which prevent the separation of power from responsibility and which provide the constitutional requisites of fairness for witnesses. A measure of added care on the part of the House and the Senate in authorizing the use of compulsory process and by their committees in exercising that power would suffice.
>
> "That is a small price to pay if it serves to uphold the principles of limited, constitutional government without constricting the power of the Congress to inform itself."
>
> *Watkins* v. *United States,* 354 U. S. at 215.

In case after case this Court has rigorously insisted upon the central importance of the requirement of proper authorization as marking the outer boundaries of legislative power to utilize compulsory process in aid of its investigatory functions. See, for example, *United States* v. *Rumely,* 345 U. S. 41; *Sweezy* v. *New Hampshire,* 354 U. S.

234; *Russell* v. *United States,* 369 U. S. 749; *Gibson* v. *Florida Legislative Committee,* 372 U. S. 579; *Yellin* v. *United States,* 374 U. S. 109; *DeGregory* v. *Attorney General of New Hampshire,* 383 U. S. 825; *Gojack* v. *United States,* 384 U. S. 702.[70]

Only last Term, in *Gojack* v. *United States,* 384 U. S. 702, the Court once again emphasized that it will insist upon "specific authorization," 384 U. S. at 709, as a minimal outer boundary marking the limits of legitimate legislative investigative activity. And in concluding his opinion for the Court, Mr. Justice Fortas highlighted the fundamental nature of this insistence upon the requirement of authorization by adopting the warning words of District Judge Weinfeld in *United States* v. *Lamont,* 18 F. R. D. at 32, that "No committee of either the House or Senate, and no Senator and no Representative, is free on

---

[70] It is clear that the requirement of proper authorization marks only the outer boundaries of the legitimate use of compulsory process to enforce legislative investigations which intrude on the area of the First Amendment. Even if the compulsory process is properly authorized by the legislature the fundamental question of the impact of the enforced inquiry upon the protections of the First Amendment remains for resolution. See, for example, *Gojack* v. *United States,* 384 U. S. 702, "since we decide the present case on other grounds, it is not necessary nor would it be appropriate to reach the constitutional question." *Cf. Gibson* v. *Florida Legislative Committee,* 372 U. S. 539, concurring opinions of Mr. Justice Douglas at 559, and Mr. Justice Black at 558. Here, the Court does not have to reach the question as to whether the respondents' use of the subpoena power, *even if properly authorized,* was a "legitimate legislative activity" within the meaning of *Tenney* v. *Brandhove, supra,* because of its impact upon protected associational activities, cf. *NAACP* v. *Alabama,* 357 U. S. 449; *Bates* v. *Little Rock,* 361 U. S. 516; *Louisiana* v. *NAACP,* 366 U. S. 293; *Gibson* v. *Florida Legislative Committee, supra,* since there is here a clear concession that the use of the subpoena power was unauthorized. See *supra,* at p. 63.

its or his own to conduct investigations unless authorized" 384 U. S. at 716.[71]

This requirement of authorization in the use of the subpoena power to enforce the investigatory functions of the legislature, particularly where the compulsory process touches the sensitive areas of the First Amendment, has been carefully constructed as a minimal outer boundary of legislative power. The enforcement of this boundary is required to "uphold the principles of limited, constitutional government". *Watkins* v. *United States,* 354 U. S. at 216. It would undermine these fundamental considerations to place a cloak of immunity over the charged activities of these respondents merely because, in the course of the illegal conspiracy they resorted to a wholly unauthorized use of compulsory process. The Speech or Debate Clause does not require a result so inconsistent with the demands of the First Amendment and the basic premises of a government of limited powers. The Clause protects only "legitimate legislative activities." *Tenney* v. *Brandhove,* 341 U. S. at 376. The unauthorized use of compulsory process to enforce investigatory activities which intrude upon the area of protected liberties is not a "legitimate" legislative activity. It is not a "technical" lapse on the part of the legislator. It is wholly beyond legislative power. *Watkins* v. *United States; Gojack* v. *United States.* No legitimate interest of the legislature is served by immunizing such conduct, cf. *United States* v. *Johnson, supra,* and the most fundamental objectives of our constitutional system call for the enforcement of legal remedies which will deter conduct so dangerous to the most precious liberties

[71] Certain of the basic constitutional considerations underlying these words, first discussed in *Watkins,* were restated recently by the Court in *DeGregory* v. *Attorney General of New Hampshire,* 383 U. S. 825: "But the First Amendment prevents the Government from using the power to investigate enforced by the contempt power to probe at will and without relation to existing need." See also *Gojack* v. *United States,* 384 U. S. at 711, fn. 9.

of the citizens—the rights of "uninhibited political expression as guaranteed to the general populace by the First and Fourteenth Amendments . . :" rights of "central importance to our political system." *United States* v. *Johnson,* 383 U. S. at 182, fn. 12. (Opinion of Mr. Justice Harlan for the Court.)

* * *

These respondents stand charged with participating with officials of the State of Louisiana in a conspiracy to utilize laws of that state to contrive raids, arrests and searches and seizures in violation of the Fourth Amendment for the purpose of intimidating and deterring the petitioners and other citizens from their efforts to enforce the guarantee of racial equality contained in the Equal Protection Clause. Both this Court, in *Dombrowski* v. *Pfister,* as well as the courts of Louisiana have emphasized the illegality of the October 4 raids. The lower court has held that the issue as to whether respondents were parties to a knowing concert of action with the state officials requires exploration and resolution by means of a trial. The Fifth Circuit has held that the state legislators charged with participation in the conspiracy must stand trial.

To hold under these circumstances that the Speech or Debate Clause nevertheless immunizes these respondents from any liability in a court of law would destroy the very premises upon which the Clause rests. Neither the decisions of this Court, the historical context out of which the privilege has emerged, nor the "presuppositions of our political history" which shape the Clause itself, require any such result. Once again this Court faces the necessity of "setting" the privileges embedded in the Speech or Debate Clause "on the foundation of reason, and limiting them by the fences of the law." *Stockdale* v. *Hansard, supra.* To immunize these respondents, a United States Senator and his assistant, from responsibility for their charged participation in a conspiracy, illegal under the laws of the

United States, to utilize state laws this Court has already struck down as violative of the Constitution, to arrange for the false arrest of citizens, for illegal raids and seizure of their property, for the purpose of deterring them from using the rights of press, speech and assembly to assist in the elimination of racial segregation and discrimination would raise the question as to whether any man, by virtue of his power, his status or his authority, is wholly above the law. This Court has firmly rejected any such suggestion from the earliest days of the Republic. The words of the Court in *Marbury* v. *Madison*, that "the Government of the United States has been emphatically termed a government of laws, and not of men" are in the last analysis the ultimate response to the claim that these respondents are not accountable in an American court of law for the conduct with which they here stand charged.

POINT TWO

No doctrine of immunity protects respondent Sourwine from liability under the cause of action for money damages.

1. Legislative Immunity is not available to Respondent Sourwine as an Employee of the Legislature.

Respondent Sourwine is the counsel for the Internal Security Subcommittee. He is not a member of Congress. The constitutional protection of the Speech or Debate Clause does not in any event extend to him. This precise question was settled by this Court in *Kilbourn* v. *Thompson*, *supra*. In *Kilbourn*, the action was for damages for false imprisonment. The defendants were several members of the House of Representatives and one John A. Thompson, Sergeant-at-Arms of the House. In upholding the immunity cast by the Speech or Debate Clause over the members of

the House, for reasons we have discussed in Point One, *supra*, the Court specifically and clearly refused to extend the immunity to the Sergeant-at-Arms, and directed that the judgment of dismissal must be reversed as to him and the case remanded for further proceedings. Thus the Court concluded in *Kilbourn*:

> "... we think the plea set up by those of defendants who were members of the House is a good defense, and the judgment of the court overruling the demurrer to it and giving judgment for those defendants will be affirmed. As to Thompson, the judgment will be reversed and the case remanded for further proceedings."
>
> 103 US at p. 205.[72]

The vitality of the *Kilbourn* insistence that the legislative immunity doctrine applies only to members of a legislature is evidenced in the Court's reaffirmation of this limitation in *Tenney* v. *Brandhove, supra.* Mr. Justice Frankfurter wrote for the Court:

> "It should be noted that this is a case in which the defendants are members of a legislature. Legislative privilege in such a case deserves greater respect than where an official acting on behalf of the legislature is sued or the legislature seeks the affirmative aid of the courts to assert a privilege. In *Kilbourn* v. *Thompson, supra,* this Court allowed a judgment against the Sergeant-at-Arms, but found that one could not be entered against the defendant members of the House."
>
> 341 US at 378.

And only last Term the Court once again reaffirmed the strength of the *Kilbourn* holding that the sweep of the Speech or Debate Clause does not extend to an employee

---

[72] The plaintiff later recovered a money judgment for $20,000 against Thompson, the Sergeant-at-Arms. See Goldfarb, *The Contempt Power* (Col. Univ. Press 1963), p. 34.

of the Legislature.[78] Mr. Justice Fortas restated the rule of *Kilbourn* in this way:

> "The leading case on the requirement of legislative purpose is *Kilbourn* v. *Thompson*, 103 US 168, 26 L. Ed. 377. *Kilbourn* did not arise under § 192,

---

[78] The English history of the privilege indicates striking reasons why the legislative immunities are available only to members of the legislature. One of the most serious abuses of the privilege which developed was its extension to the servants of members. See Taswell-Longmead, Eng. Const. Hist. (11 ed. Pluckett, 1960) at 580.

> "In the 18th century . . . the extension of the privilege of peers and members from arrest, so as to protect not only their own persons, but their property, their servants and their servants' property, and even to protect their game from poaching . . . gave rise to very grave abuses, and the commons even took up the position that they and their servants were immune from civil proceedings of every kind . . ."

As Professor Wittke has described the situation:

> "By the extension of privilege to members' servants, and by granting protections to men who had no connection with either house of Parliament, scores of British subjects were freed from all amenability to the common law courts and privilege became a menace to individual liberty." Wittke, *Parliamentary Privilege in the Empire* in Essays in Honor of Charles Howard McIlwain 321 (1965).

The extension of the legislative immunities to Members' servants became so abusive that Parliament enacted a series of statutes curbing these excesses. See for example:

> 9. Act for preventing any inconveniences that may happen by Privilege of Parliament, 1700, 12 WM 3, C. 3, 1703, 2 & 3 Anne C. 18, Act to amend act passed in 12-13 years of William III, 1738, 11 Geo 2, C. 24, Act for further preventing Delays of Justice by reason of Privilege of Parliament 1770, 10 Geo 3, C. 50.

And as Professor Wittke states:

> "At present, the application of privilege has been greatly limited. Members' servants have long been denied the protection of Parliament" *Wittke, supra* at 205.

> but was a damage suit arising out of a direct exercise by the House of Representatives of a claimed power to punish for contempt. The Court held that since the subject matter of the investigation had not been legislative in character, the order of contempt of the House, directing its Sergeant-at-Arms to imprison the contumacious witness, afforded the Sergeant no protection from liability." *Gojack* v. *United States*, 384 US at 705 fn. 3.

The opinion of the lower court extending the legislative immunity to Respondent Sourwine, not a member of either House, was in direct conflict with the conclusions of this Court in *Kilbourn*, only recently reaffirmed in *Tenney* and *Gojack*, and ought to be reversed.[74]

2. No Immunity Attaches to the Actions of Respondent Sourwine Under the Doctrine of *Barr* v. *Matteo*.

(a) The lower court appears to concede that under *Kilbourn*, no immunity would extend to respondent Sourwine but suggests that *Barr* v. *Matteo*, 360 U.S. 564, in some way may have modified this Court's holding in *Kilbourn*. See footnote 11, Court of Appeals *per curiam* opinion (R. 109). However, the Court's recent discussion of *Kilbourn* in *Gojack* v. *United States*, 384 U.S. 702, would

---

[74] It is of course clear that even if the Speech or Debate Clause were to be extended to employees of the legislature the immunity does not cover respondent Sourwine for the reasons discussed in full in Point One, *supra*. Legislative immunity, as we have seen, does not extend to participation in wrongful or illegal acts which are not within the sphere of legitimate legislative activity such as participation in a conspiracy with State officials to contrive false arrests and illegal searches and seizures in violation of the Fourth Amendment. Legislative privilege may not immunize respondent Sourwine from liability for participating in the illegal conspiracy any more than it immunized Sergeant-at-Arms Thompson for his participation in the illegal arrest in *Kilbourn*. And unlike Thompson, Sourwine cannot even plead, even unsuccessfully, the justification of an authorizing legislative resolution for his wrongful actions.

seem to dispel any question whatsoever concerning the continued vitality of that decision in respect to the unavailability of the legislative privilege to the Sergeant-at-Arms of the House in that case, or to the counsel to the Senate Subcommittee, equally a legislative employee, in this case.[75]

It would seem quite clear that the considerations which led the Court in *Barr* v. *Matteo* to extend the executive privilege to the Acting Director of the Office of Rent Stabilization are not applicable in the area of legislative activity. The policy considerations underlying the decision to further extend the executive immunity reflected a concern with "the effective functioning of government" in a period of "complexities and magnitude of governmental activities." 360 U.S. at 564. The policy considerations underlying the constitutional immunity embedded in the Speech or Debate Clause are quite different. Cf. *United States* v. *Johnson, supra.* They reflect primarily, as Mr. Justice Harlan discusses in his opinion for the Court, the necessity for preserving the freedom of speech and debate of the elected representatives of the people against intimidation by a hostile executive or judiciary. 383 U.S. at 182. These principles are not served by extending immunity to employees of the legislature, such as the Sergeant-at-Arms of the House, as in *Kilbourn,* or to an employee of a Senate Committee, as here. As we have seen in our main discussion on the scope of the Speech or Debate Clause, the reasons for limiting immunity to legitimate legislative activity of members of the legislature are manifold. See *Point One, supra.* General extension of the executive privilege to employees of the legislature would undermine the proper limitations upon legislative immunity which the Clause itself invokes. *Kilbourn* v. *Thompson; United*

[75] It is of some interest in connection with the suggestion that *Barr* v. *Matteo* may have weakened the holding in *Kilbourn* (R. 109), that the opinion of Mr. Justice Harlan, announcing the judgment of the Court in *Barr,* affirmatively relied upon the decision in *Kilbourn* to describe the scope of the legislative privilege. 360 U.S. at 569, fn. 6.

States v. *Johnson*, both *supra*.[76] And in the circumstances of this case, extension of a doctrine of immunity to employees of congressional committees investigating political opinions and associations of citizens would serve to encourage lawless and arbitrary action in a field in which the Court has expressed considerable concern as to the impact of legislative investigatory activity upon the sensitive area of First Amendment liberties. *Gojack* v. *United States*, *supra*; *De Gregory* v. *New Hampshire*, *supra*; *Watkins* v. *United States*, *supra*.

(b) However, even if the official immunity doctrine of *Barr* v. *Matteo* were to be extended to apply to employees of the legislature, as in *Wheeldin* v. *Wheeler*, *supra*, the doctrine has no applicability here. As we have discussed previously, see *Point One*, *supra*, the concession of the Solicitor-General in *Wheeldin* approvingly adopted by the Court that the respondent there "was not acting sufficiently within the scope of his authority to bring the doctrine into play", 373 U.S. at 647, is fully determinative here. Respondent Sourwine is charged with participation in a conspiracy under color of Louisiana laws to contrive false arrests and carry through illegal raids and seizures for the purpose of interfering with protected rights of citizens. This is an issue the lower court has concluded

---

[76] The only time the Court has had before it the question of whether the doctrine of *Barr* v. *Matteo* applies at all to employees of the legislature was in *Wheeldin* v. *Wheeler*, *supra*. There the Court did not reach the question since it was conceded by the Solicitor General, and agreed to by the Court, that under the allegations of the complaint the respondent "was not acting sufficiently within the scope of his authority to bring the [immunity] doctrine into play" 373 U.S. at 647. Mr. Justice Douglas appears, however, in the opinion for the Court, to raise a question as to whether the *Barr* doctrine applies at all to legislative employees. The Justice comments "there is much discussion in the briefs of *Barr* v. *Matteo*, 360 U.S. 564" and then points out "but that was a libel action brought against a federal official in the District of Columbia" 373 U.S. at 650.

requires exploration and resolution by means of a trial (R. 105). The use of unauthorized subpoenas signed in blank by the respondent Eastland in the course of the charged conspiracy is no more "within the scope of his authority" than was the use of unauthorized subpoenas by the respondent in *Wheeldin*.

(c) Respondent Sourwine's actions are in any event, in no way protected by the doctrine of *Barr* v. *Matteo*. Mr. Justice Harlan's opinion makes it very clear that it "is not the title of his office" which "must provide the guide in delineating the scope of the rule" but rather "the relation of the act complained of to 'matters committed by law to his control or supervision', *Spalding* v. *Vilas, supra*, at 498", 360 U.S. at 573, 574. Nothing could be clearer than that the "act complained of", participation in an illegal conspiracy under color of state laws to violate the Fourth Amendment, is not protected in any way by the immunity doctrine, as defined in Mr. Justice Harlan's opinion in *Barr* v. *Matteo*. These charged acts, illegal under federal civil and criminal law, Title 42 U.S.C. 1983 and 1985, and Title 18 U.S.C. 241, 242, no more relate to matters "committed by law" to his "control or supervisions" than participation in the illegal conspiracy to defraud the United States constituted action within the sphere of the "legitimate legislative activity" of Congressman Johnson, *United States* v. *Johnson, supra*. Under the doctrine of *Barr* v. *Matteo*, respondent Sourwine's activity receives no absolute immunity. [77]

---

[77] The concurring opinion of Mr. Justice Black in *Barr* v. *Matteo*, without which there would not have been a Court, is most instructive in this respect. Mr. Justice Black joined the Court on the assumption that the activity of the government official complained of was "neither unauthorized nor plainly beyond the scope of Mr. Barr's official business but instead related more or less to general matters committed by law to his control and supervision." 360 U.S. at pp. 577 and 578.

(d) Several recent Court of Appeals decisions have emphasized that charges of participation in illegal searches and seizures remove the federal officers involved from the protection of the immunity doctrine announced in *Barr* v. *Matteo*. In *Hughes* v. *Johnson*, 305 2d 67 (C.A. 9, 1962, opinion by Circuit Judge Merrill), the Court of Appeals for the Ninth Circuit rejected a claim for immunity under *Barr* v. *Matteo* on the part of federal game wardens acting under the Migratory Bird Act charged with participation in illegal searches and seizures. The Court pointed out that such conduct, in violation of the Fourth Amendment, does not "fall within the scope of the official duties of these appellees. In our view, it cannot, and accordingly, immunity does not extend to such conduct" 305 F. 2d at 70. In *Kelley* v. *Dunne*, 344 F. 2d 129 (C.A. 1, 1965, opinion by Chief Judge Aldrich), the First Circuit refused to extend the immunity doctrine of *Barr* v. *Matteo* to cover postal inspectors charged with engaging in unlawful searches and seizures, pointing out that "the public need to protect such conduct, or conduct difficult to separate therefrom, is minimal" 344 F. 2d at 133. As the First Circuit pointed out "there would be no serious hamstringing of the activities of postal inspectors if in the absence of a warrant, they were obligated, to some extent to defend their actions." 344 F. 2d at 133.[78]

The activity of respondent Sourwine was wholly "unauthorized" by the Committee. See Point One, *supra*. And it is certainly clear that participating in the planning of illegal arrests, raids, and seizures in violation of the Constitution was "plainly beyond the scope" of Mr. Sourwine's "official business." *Howard* v. *Lyons*, 360 U. S. 593, the companion case to *Barr*, leads to the same conclusions. In the words of the *Howard* opinion, respondent Sourwine's actions were hardly "in discharge of" his "official duties." 360 U.S. at 598.

[78] See Note, 44 Texas Law Review, 570 (1966). The note points out that "conducting an unlawful search is not only uncustomary but is clearly beyond the scope of an official's authority." at p. 573.

In *Fowler* v. *Southern Bell Telephone and Telegraph Co.*, 343 F. 2d 150 (C.A. 4, 1965, opinion by Circuit Judge Bell) the Fourth Circuit recently faced an analogous problem to the illegal searches and seizures in *Hughes* v. *Johnson* and *Kelley* v. *Dunne*. Special investigators for the Alcohol and Tobacco Tax Division of the Department of Internal Revenue were charged with wiretapping. The Court of Appeals rejected any claim of immunity under *Barr* v. *Matteo* for the alleged acts of wiretapping, in an opinion which raises considerations relevant here. The Court pointed out:

> "Defense of sovereign privilege imposes a drastic impingement on personal liberty, and is recognized only because this impingement is considered justified in order to encourage public officials to fearlessly discharge the duties of their office. . . . The defense should not be sustained on the basis of technical procedural defaults of the opposing party or in the absence of a clear and specific factual demonstration that the actions of the officers were indeed taken in pursuit of their official duties. This standard has not yet been met in connection with the alleged wiretapping here." 343 F. 2d at 155.

These recent Court of Appeals decisions emphasize that the policy considerations which impelled the Court to extend the official immunity doctrine in *Barr* v. *Matteo*—a determination that federal officials should not be deterred in their freedom to develop executive policy by the fear of "civil defamation suits", 360 U.S. at 574—do not govern situations in which federal officials are charged with illegal invasions of citizens' constitutionally protected rights to privacy and security of person. Here damage suits which "might appreciably inhibit" the unlawful violation of the liberties of the First and Fourth Amendments serve the highest public purpose. The "fearless, vigorous and effective administration of policies of government", *Barr* v. *Matteo*, 360 U.S. at 571, is not inhibited by a requirement that Government officials hew at a minimum to the com-

mands of the Constitution. *Olmstead* v. *United States*, 277 U.S. 438, 485.[79]

(e) Finally, even if the doctrine of official immunity elaborated in *Barr* v. *Matteo* could possibly be stretched to apply to the facts of this case there is very serious question as to whether the judicially constructed doctrine is applicable at all to actions brought under the Civil Rights Acts, Title 42 U.S.C. 1983 and 1985. Cf. *Monroe* v. *Pape*, 365 U.S. 167; *Chafin* v. *Pratt*, 358 F.2d 349 (C.A. 5, 1965), *Birnbaum* v. *Trussell*, 347 F.2d 86 (C.A. 2, 1965); *Pierson* v. *Ray*, 332 F.2d 213 (C.A. 5, 1965) cert. granted— U.S. —, #79 and 94, October Term, 1966.[80]

In *Birnbaum* v. *Trussell, supra*, the Second Circuit, in an opinion by Circuit Judge Hays, suggests that the doctrine of official immunity has no relevance to actions brought under the Civil Rights Acts.[81] The Court of Appeals points out that "a showing that defendants acted 'within the scope of their employment and authority' is not sufficient to defeat the district court's jurisdiction.

---

[79] *Barr* v. *Matteo* does not, we suggest, within its own definitions immunize the charged illegal acts of participation in the October 4 raids. If the doctrine could be stretched to such a point the recent comment of Circuit Judge Brown in *Chafin* v. *Pratt*, 358 F.2d 349 (C.A. 5, 1966) would require consideration: "[I]t may well be that the immunity doctrine has now been extended too far, that the policy of the doctrine as analyzed by Judge Learned Hand in *Gregoire* v. *Biddle*, 2 Cir. 1949, 2 Cir. 1949, 177 F.2d 579, cert. denied, 1950, 339 U.S. 949 merits reexamination, especially in light of the trend towards contracting other kinds of tort-liability immunity." 358 F. 2d at 353, fn. 9. *Cf.* the dissenting opinions of the Chief Justice and Mr: Justice Douglas in *Barr* v. *Matteo*, 360 U.S. at 578, the dissenting opinion of Mr. Justice Brennan, 360 U.S. at 586, and the dissenting opinion of Mr. Justice Stewart, 360 U.S. at 592.

[80] See, also, generally, *The Doctrine of Official Immunity Under the Civil Rights Act*, 68 Harv. L. Rev. 1229 (1955).

[81] See also the recent decision in *Fleming* v. *Adams*, 253 F. Supp. 542 (D.C. Col. 1966) citing *Birnbaum* approvingly.

It would nullify the whole purpose of the Civil Rights statutes to permit all governmental officers to resort to the doctrine of official immunity." The Court of Appeals went on to point out that "to the extent that defendants acting 'under color' of state law 'violate or conspire to violate constitutional and federal rights the Civil Rights Laws, 42 U.S.C. 1983 and 1985 abrogate the doctrine of official immunity.' " 347 F.2d at 89.[82]

As we have pointed out, the doctrine of official immunity has no applicability whatsoever to the facts of this record. But if it could be enlarged in such a way so as to immunize the acts of respondent Sourwine we would suggest that such a result would undermine the Congressional purpose underlying the Civil Rights Acts. This Court has held that "Congress, in enacting § 1979, meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Monroe* v. *Pape,* 365 U.S. 167, 172. A grant of immunity to this respondent who, acting under color of state laws, is charged with conspiring, together with state officials, to violate the Fourth and Fourteenth Amendment rights of the petitioners and other citizens through participation in the plan to contrive the October 4 raids would, in the words of the Second Circuit, "nullify the whole purpose of the Civil Rights Statute." *Birnbaum* v. *Trussell,* 347 F.2d at 89.

---

[82] The Fifth Circuit has expressly left open the question as to whether the immunity doctrine applies to suits brought under the Civil Rights Act. In *Chafin* v. *Pratt,* 358 F. 2d 349 (C.A. 5, 1966), the Court of Appeals expressly "refrained from deciding" this question, 358 F.2d at 354. The Court in its opinion by Circuit Judge Brown, pointed out that the Circuit had also expressly refrained from deciding this question in both *Norton* v. *McShane,* 332 F.2d 855, cert. den. 1965, 380 U.S. 981 and in *Pierson* v. *Ray,* 352 F.2d 213, cert. granted — U.S. — , Nos. 79 and 94, October Term, 1966. Accordingly, this question is presently before the Court in *Pierson* v. *Ray,* Nos. 79 and 94, October Term, 1966. As the Court of Appeals said in *Chafin,* "In *Pierson* v. *Ray, supra,* we noted that it is still uncertain whether immunity applies to suits under the Civil Rights Act and again refrained from deciding the question. 352 F.2d at 218". 358 F.2d at 354, fn. 16.

POINT THREE

The lower court was fully justified in concluding that there are in this record disputed issues of fact as to whether respondents were parties to a knowing concert of action with the state officials which would require exploration and resolution by way of a trial.

We have already pointed out that in this Court the respondents have not chosen to argue that the mantle of legislative immunity may properly be placed over the charge that they participated in a conspiracy with the state officials under color of state law, to contrive the illegal October 4 raids, arrests, searches and seizures. They would seem to agree that such conduct is totally beyond the scope of "legitimate legislative activity." See *Point One, supra,* at p. 64; Brief for Respondents in Opposition, pp. 10, 11. Instead they chose to rest their defense to this claim solely upon the argument that summary judgment was properly entered by the District Court on the cause of action for money damages because the petitioners failed to put forward a serious claim that the respondents were parties to the conspiracy. Brief for Respondents in Opposition, pp. 9, 10. See *Point One, supra,* at p. 65.

The difficulty with this position is, of course, that the Court of Appeals has already found against the respondents on this question. In the lower court respondents argued alternatively (1) that the petitioners "failed to put forward a serious claim that appellees [respondents] were parties to a knowing concert of action with the state officials" (R. 105), see Brief for Appellees, pp. 13, 30, and (2) that "in any event, the doctrine of legislative immunity insulates appellees from suit" (R. 105), Brief for Appellees, pp. 30-37. The Court of Appeals rejected the first position pointing out that "were only the former involved, we might have considerable difficulty in concluding that there were no dis-

puted issues of fact requiring exploration and resolution by means of a trial" (R. 105). The heart of the matter is that the respondents are now asking this Court to overturn the conclusion of the court below that on the record there are disputed issues as to the respondents' participation in a knowing concert of action with the state officials which can only be resolved by means of a trial. Placing to one side any question as to the propriety of such a request from the point of view of judicial administration, the conclusion of the lower court that the issue as to whether respondents were parties to the charged conspiracy requires "exploration and resolution by means of a trial" is fully supported by the record.

Respondents' position very simply is that their naked denials of the participation in the conspiracy together with the denials of their charged co-conspirators are sufficient to grant summary judgment on the conspiracy charge. See Brief for Respondents in Opposition, pp. 9, 10.[83] This argument totally disregards the entire record. The total record, complaint, affidavits and depositions contain evidence of respondents' participation in the "knowing concert of action with the State officials" (R. 105), more than sufficient to compel the conclusion of the Court of Appeals that this was a "disputed issue of fact requiring exploration and resolution by means of a trial" (R. 105).

The "concert of action" is set forth in the complaint. The complaint charges that the respondents, Eastland and Sourwine, participated in a plan and conspiracy together

[83] The Solicitor-General's position is that respondents Eastland and Sourwine have sworn "that they had played no part in the October 4 searches . . . that their actions in subpoening the seized materials had not been part of any understanding or conspiracy with the Louisiana officials responsible for the searches" and that they "had no prior knowledge of the Louisiana legislative committee's decision to proceed by search and arrest warrants." Brief for Respondents in Opposition, pp. 9, 10.

with certain Louisiana State officials, to utilize certain state statutes as the device to contrive and instigate raids, arrests, searches and seizures, in violation of the Fourth Amendment, to seize, among other things, the files and membership lists of SCEF for the purpose of harassing, intimidating and deterring the petitioners and other citizens from exercising federal rights under the First Amendment in their efforts to implement the promise of racial equality guaranteed by the Fourteenth Amendment (R. 2-12).

The following essential facts emerge from the complaint, affidavits and depositions from which respondents' participation in this plan or conspiracy may be inferred sufficient to require resolution by trial. See *Poller* v. *Columbia Broadcasting System*, 368 U. S. 464; *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620; *United States* v. *Continental Oil Co.*, 377 U. S. 161. See also *Blumenthal* v. *United States*, 332 U. S. 539; *Pereira* v. *United States*, 347 U. S. 1; *Glasser* v. *United States*, 315 U. S. 60; *American Tobacco Co.* v. *United States*, 328 U. S. 781.[84]

1. Respondent Sourwine had several private discussions during the summer and early fall of 1963 just prior to the October raids with Jack N. Rogers, the counsel to the Joint Legislative Committee on Un-American Activities of the Louisiana legislature. These discussions were about the records and files of SCEF (R. 40, 41). The first discussion took place about July 17, when Rogers told Sourwine that the Louisiana Committee was contemplating obtaining the records (R. 40).

2. Sometime prior to September 20, it was concluded that the method of seizure of the SCEF records ought to be through using the criminal provisions of the Louisiana anti-subversive laws to obtain arrest and search

[84] All of these facts come from respondents' own proof in the form of affidavits submitted, from the Sourwine deposition or from decisions of the Louisiana courts and the federal courts.

warrants, rather than proceeding as had been first discussed by direct subpoena by the Legislative Committee (R. 71).[85]

Respondents' own affidavits place this decision to use the device of raids and arrests sometime prior to September 20, when the plan was proposed to the Louisiana police by Rogers (R. 71). Rogers himself says in his affidavit that he advised the Joint Committee that the SCEF operations were in violation of the Louisiana criminal laws and that sometime prior to September 20 the Joint Committee directed him to take the matter up with the Louisiana Police (R. 71).

3. Actually, an affidavit of the Staff Director of the Joint Committee filed in the Louisiana branch of the litigation reveals that the plan to utilize police procedures to carry out the raids and seizures originated as early as August 27. The Alexander affidavit, Appendix F to this Brief, reveals that the plan to seize the SCEF records, designated as "Operation Tip-Top" was discussed at an August 27 meeting of the Joint Committee at which time Alexander was told to contact officials of the New Orleans Police Department and enlist their assistance. See minutes of August 27 meeting, affixed as an exhibit to the Alexander affidavit, Appendix F to this Brief.

4. Rogers' own affidavit then reveals that considerably after the 27th of August, around "the middle of September", he made a telephone call to Sourwine and discussed the SCEF records with him again and asked him if he, Sourwine, and another Subcommittee employee could come down to Louisiana when the records were obtained and help "evaluate" the material (R. 71). Sourwine's own affidavit confirms the discussion (R. 40). Sourwine then discussed the content of this talk with Senator Eastland (R. 40). These discussions

[85] It is a fair inference that the participants in this plan were aware of the decisions of this Court such as *Louisiana* v. *NAACP*, *supra*; *cf.*, also, *NAACP* v. *Alabama* and *Gibson* v. *Florida*, both *supra*, holding that the enforced production of membership lists of civil rights organizations in the southern states violated the First Amendment guarantee of freedom of association.

took place after the August 27 discussion of the plan described in the Alexander affidavit to use raids and arrests to seize the SCEF records, and just at the time, by Rogers' own admissions, that he was preparing to put the plan into operation (R. 71).

5. Sometime shortly after the middle of September, Rogers put the plan into operation. On or about September 20, he met with the State Superintendent of Police and requested that he have the State Police obtain search warrants for the SCEF offices and petitioner Dombrowski's home (R. 72). Rogers' affidavit states that he offered to assist the police and his offer was accepted. On October 2, Rogers and a policeman swore to applications for search warrants and arrest warrants under the Louisiana "anti-subversive" statutes and they were issued (R. 72).

6. On October 4, the raids, arrests and seizures of the SCEF records and properties, which were the object of the plan, took place. The circumstances of the arrests and raids are detailed in this Court's opinion in *Dombrowski* v. *Pfister*, 380 U.S. 479, 480, fn. 4. Rogers and police officers broke into the office of SCEF and seized the entire contents of the office including the records, and membership lists which had been the subject of the August and September discussions (R. 4, 5, 21, 22). These raids, the arrest warrants, and the search warrants were all, at later stages, in the state court litigation, declared to be illegal. The arrest warrants were held to have been issued without reasonable cause and the petitioner summarily discharged (R. 19, 20). The search warrants and the seizures of the SCEF records and property of the petitioners were held to be in violation of the Fourth and Fourteenth Amendments, under this Court's decision in *Mapp* v. *Ohio* (see Appendix B).

7. Although none of this was known to petitioners or to the public at the time, the records and files of SCEF were swiftly transferred from the control of the police over to the control of the Louisiana Committee and the respondents Eastland and Sourwine. This was accomplished through a complicated maneuver. At the time of the seizure of the records by the police on the afternoon of October 4, Rogers served upon the police officer

in charge a Louisiana Joint Committee subpoena requiring "forthwith production of everything seized by the police" (R. 72). The seized materials, however, remained in the physical possession of the police, who took them that evening to Baton Rouge (R. 72). At 10:30 p.m. that evening, Rogers telephoned Sourwine in Washington and told him about the seizures of the SCEF records. Rogers told him that the Louisiana Committee had obtained all the files and records of SCEF and urged him to come down to Louisiana "as soon as possible" (R. 40, 73).

8. The next stage in the secret transfer of the seized records took place the following morning. Sourwine left Washington at 8:20 and arrived in Baton Rouge at 11:00 (R. 41). According to his own deposition testimony he came prepared with blank subpoenas signed by Eastland (R. 32). After discussing the situation with Rogers he then had a telephone conversation with Eastland (R. 41). Sourwine then had the blank subpoenas filled out in Baton Rouge by Rogers' secretary and served them on Rogers that morning (R. 32). There is some evidence, the date on the face of the subpoenas, that they were actually made out on the 4th, the day of the raids (R. 32, 33), but the respondents say this was a "stenographic error" (R. 33, 41). In any event the final step in the complicated transaction was to "appoint" the Superintendent of the Louisiana police the "custodian" of the seized records on behalf of Sourwine (R. 37). However, the location of the records remained in Baton Rouge under the physical control of the state officials (R. 37). The issuance of these subpoenas was never authorized by the Internal Security Subcommittee or by the full Committee (R. 33, 34). Within twenty-four hours the planned operation had taken place, from seizure by the police under color of the illegal search and arrest warrants, to the instantaneous transfer to the Louisiana Committee, to the transfer the next morning to respondents Sourwine and Eastland.

9. None of the details of the secret plan were known to petitioners, or for that matter to the public, until October 25, the day of the preliminary hearing on the arrest warrants in the state court. After the state court

vacated the warrants and discharged petitioners, the Louisiana officials informed the Court that they could not comply with any order to return the records and membership lists since they were technically in the custody of Sourwine and Eastland (R. 28). Until that moment petitioner had known nothing about respondents' role in the raids and the seizures.

10. The petitioners then filed their first federal complaint. See Statement of Facts, p. 11, *supra*. A motion for a temporary restraining order was presented to District Judge Ainsworth on Sunday morning, October 27. The Judge was assured by representatives of the State that the seized records were still in Baton Rouge (R. 29). Accordingly, he directed that the motion be returnable before him Monday morning, the 28th. He also directed that petitioners notify respondent Eastland that the motion would be heard in District Court the next morning (R. 29). A telegram was sent to Eastland informing him that an injunction enjoining the turning of the SCEF records over to him was to be discussed at 9:30 a.m., Monday morning, in Judge Ainsworth's office (R. 54).

11. On Sunday evening, as soon as he received this telegram, Eastland arranged to have the seized records immediately moved out of the jurisdiction of the Louisiana federal court, over the state border to Woodville, Mississippi. He then directed Sourwine to telephone Baton Rouge at once and arrange to have all the seized records, membership lists and other SCEF property transferred that night out of the State of Louisiana (R. 55). When it appeared that hiring a truck would be difficult at that time of night, Eastland told Sourwine to "get them started" and "get them out to Woodville and if necessary you can leave them with the Chancery Clerk there" (R. 55).

12. At about 10:00 p.m. Sourwine telephoned Rogers and asked him to give the police Eastland's instructions to get the SCEF records out of Louisiana that night and over to Woodville, Mississippi (R. 73-74). At 11:43 p.m. Sourwine confirmed these instructions to move the SCEF material immediately out of the state, in a telegram he sent to the Superintendent of Police

(R. 56). As a result of these Sunday night moves, at about midnight a vanload of material containing the seized SCEF records and lists was moved over the Louisiana state border to Woodville, Mississippi, and left under the protection of the Mississippi Clerk of the Chancery Court at Woodville (R. 29, 58).

13. This midnight transfer of the seized SCEF records out of the State of Louisiana into Mississippi was neither authorized by or known to other members of the Senate Subcommittee (R. 57).

14. On Monday morning, October 28, after postponing their 9:30 appearance until 12:00 noon, the attorneys for the state officials appeared before Federal Judge Ainsworth and informed him and the petitioners that the seized SCEF records were no longer in the jurisdiction of the Federal District Court since all the records and materials seized in the illegal raids of October 4 had been removed the night before from the State of Louisiana and were now in the State of Mississippi, across the state line (R. 29).

Upon this record, built primarily out of statements and admissions made by the respondents themselves, it is more than understandable that the lower court would have had "considerable difficulty in concluding that there were no disputed issues of fact requiring resolution by means of a trial" (R. 105). Summary judgment for the respondents on the issue of their participation in the "knowing concert of action with the state officials" (R. 105) would be unthinkable on such a record. *Poller* v. *Columbia B oadcasting System*, 368 U.S. 464, is dispositive here.[86] As Mr. Justice

---

[86] In *Poller* v. *Columbia Broadcasting System*, Mr. Justice Clark defined the principles controlling summary judgment in a manner instructive here:

"Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case 'show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56(c), Fed.

Clark pointed out in *Poller*, summary procedures should be used "sparingly in . . . complex litigation where motive and intent play leading roles, [and] the proof is largely in the hands of the alleged conspirators and hostile witnesses thicken the plot." In these cases "trial by affidavit is a substitute for trial by jury which so long has been the hallmark of even-handed justice," 368 at 491. Here, on this record, the evidence shows an overwhelmingly strong case, requiring trial by jury. Participation in a conspiracy need not be proven by direct evidence, but a common purpose and plan may be inferred from a development of circumstances. *Glasser* v. *United States*, 315 U.S. 60. As this Court pointed out in *Blumenthal* v. *United States*, 332 U.S. 539, "Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others. Otherwise . . . conspirators would go free by their very ingenuity." 332 U.S. at 556, 557. And in *American Tobacco Co.* v. *United States*, 328 U.S. 781, the Court wrote, in words directly applicable here, "where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified," 378 U.S. at 810. And only last

---

Rules Civ. Proc., 28 U.S.C.A. This rule authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' *Sartor* v. *Arkansas Natural Gas Corporation*, 321 U.S. 620, 627, 64 S. Ct. 724, 728, 88 L. Ed. 967 (1944)." 368 U.S. 464 at 467.

term, the Court in discussing the requirement of showing of conspiracy in a Sherman Act case said, in instructive terms here, "Explicit agreement is not a necessary part of a [Sherman Act] conspiracy—certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution and fulfillment of the plan." *United States* v. *General Motors Corp.*, 86 S. Ct. 1371 (opinion by Mr. Justice Fortas). See also *United States* v. *Parke Davis Co.*, 362 U. S. 29; *United States* v. *Bausch & Lomb*, 321 U.S. 707.

The record here fully shows a "joint and collaborative action [which] was pervasive in the initiation, execution and fulfillment of the plan" 86 S. Ct. at 1329. Based upon facts appearing solely in their own affidavits and their own deposition testimony, it is almost unbelievable that having jointly discussed the SCEF records at the very time when the plan to instigate the illegal raids was germinating, that these respondents did not know of, or share in, the planning. As the Court has recently pointed out, "joint and collaborative action," such as the record shows here, amply grounds a conspiracy finding. *United States* v. *General Motors, supra.*

The respondents say in this Court that they "had no prior knowledge of the Louisiana Legislative Committee's decision to proceed by way of search and arrest warrants," Brief for Respondents in Opposition, p. 10. This would seem to be an incredible assertion in the face of respondents' own evidence, to say nothing of the disclosure of the August 27 meeting, but at a minimum it is surely impossible to say that "it is quite clear what the truth is [and] no genuine issue remains for trial" *Poller* v. *Columbia Broadcasting System*, 368 U.S. at 467. Furthermore in the face of the story of the October 4 twenty-four hours is it possible to say that there is "no genuine issue" as to whether there was a "joint and collaborative action" in "executing and fulfilling" the objectives of the illegal seizures? *United States* v. *General Motors, supra,* and *cf. United Mine*

Workers v. *Gibbs*, 86 S. Ct. 1130. Or for that matter is it possible to say that "no genuine issue remains for trial" as to the reasons for the extraordinary events of Sunday night, October 28th? Is it "quite clear," *cf. Poller* v. *Columbia Broadcasting, supra,* that the truth may not be that respondents Eastland and Sourwine engaged in the midnight spiriting of the seized records out of the jurisdiction of the Louisiana federal court because they knew that they had been illegally and unlawfully seized in the October 4 raids?[87]

It would seem more than apparent why the lower court commented that it would "have considerable difficulty in concluding that there were no disputed issues of fact requiring resolution by means of a trial" (R. 105). The issue as to whether these respondents were "parties to a knowing concert of action with the state officials" (R. 105) to contrive the illegal raids of October 4 must be settled by a "trial by jury which so long has been the hallmark of 'even-handed justice' " *Poller* v. *Columbia Broadcasting System*, 368 U.S. at 473. This Court has no cause to disturb the conclusions of the lower court that this issue requires "exploration and resolution by means of a trial" (R. 105).

---

[87] The law is filled with prejudicial inferences to be drawn from attempts to suppress or conceal or remove evidence. *Bruce Cotton* v. *United States*, 50 F. 2d 257, affd. 55 F. 2d 568 (C.A. 5); *The Sam Sloan*, 65 F. 175 (D.C. N.Y.); see *Great American Insurance Co.* v. *Horab*, 309 F. 2d 262 (C.A. 8, 1962); *cf.*: *Commonwealth* v. *Webster*, 5 Cush. (Mass.) 295; or the prejudicial inference to be drawn from attempts to prevent an investigation of a matter in controversy, *Hodges* v. *Murray*, 240 Ky. 127; *Polk* v. *Missouri-Kansas-Texas R. Co.*, 351 Mo. 865.

POINT FOUR

The equitable relief sought by petitioners was appropriate.

(a) The District Court dismissed the cause of action for equitable relief, without a hearing on the allegations, treating the action as a request for injunctive relief against a Committee of the Senate. Invoking the principle of "'separation of powers'' the District Court stated that ''this Court may not enjoin a Congressional Committee from pursuing its activities'' (R. 13), and dismissed the complaint for want of jurisdiction.

The Court of Appeals properly disregarded this contention pointing out that the complaint did not seek to enjoin the Senate Committee in any respect, but that the relief sought was directed solely against the individual respondents (R. 104).[88] As the Court of Appeals conceded, the complaint did not seek injunctive relief against the functioning of a Congressional Committee (R. 104).

---

[88] That this complaint states a cause of action for equitable relief under the Civil Rights Act, *Dombrowski* v. *Pfister*, 380 U.S. at 490; *Hague* v. *CIO*, 307 U.S. 496; *Bush* v. *New Orleans Parish School Board*, 188 F. Supp. 916, aff'd 365 U.S. 569; *Jordan* v. *Hutchinson*, 323 F. 2d 597 (C.A. 4, 1963), is clear. The doctrine of separation of powers has, of course, no relevance here. The complaint charges that these respondents, together with legislative and executive officials of the state, conspired to use state law to conduct the illegal raids. The fact that they are "legislative" officers or employees has no impact upon the power of a federal court to grant equitable relief. *Jordan* v. *Hutchinson, supra. Bush* v. *New Orleans Parish School Board, supra.* In any event, it is too late to argue that the investigative powers of Congress are not subject to the controls of the Constitution and judicial review. From *Kilbourn* v. *Thompson*, 103 U.S. 168 to *Watkins* v. *United States*, 354 U.S. 178, the principle is crystal clear that the investigative functions of Congress are subject to constitutional control. The words of the Chief Justice in *Watkins* are decisive here: ". . . Clearly, an investigation is subject

The complaint charged that these individual respondents "without warrant or authority of law" pursuant to the conspiracy "secretly and surreptitiously" were in possession of certain books, records and other documents which had been seized in the illegal raids of October 4th conducted under color of laws of the State of Louisiana (Complaint, Paragraph 22, R. 7), and went on to charge that "in order to evade the jurisdiction" of the United States District Court for the Eastern District of Louisiana, the respondents transferred certain of these documents and records to the District of Columbia and that these "are presently in the possession of defendants Eastland and Sourwine in the District of Columbia". Other documents and records belonging to petitioners were "also secretly and surreptitiously transferred to a State Court House in the State of Mississippi and are presently in the possession of defendant Eastland" (Complaint, Paragraph 22, R. 7).

The complaint nowhere charged that the illegally seized records or documents were in the custody or possession of the Senate Committee. It charged solely that they were illegally and without "warrant of law" in the possession of

---

to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of law making. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of these protected freedoms by law or by lawmaking." Lest there be any impression whatsoever that the investigative functions of Congress are free of judicial restraint through some magic invocation of a formula of "separation of powers" the Chief Justice went on further in *Watkins* and warned: ". . . We cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly."

the individual respondents, Sourwine and Eastland, who had obtained them pursuant to a conspiracy to utilize Louisiana state laws to violate petitioners' federally protected rights.

As far as the complaint was concerned, and that was all that was properly before Judge Holtzoff on the motion to dismiss, *Clark, Attorney General* v. *Vebersee Firanz Korporation*, 332 U.S. 480, injunctive relief was sought to restrain these respondents who had participated in a conspiracy under color of state law, from using or disposing of the fruits of the illegal searches and seizures. There was no allegation whatsoever that the illegally seized material was in the possession of the Senate Committee, nor was any injunctive relief sought against the Committee. As a matter of fact, the complaint alleged that a good portion of the illegally seized material was then sitting in the private possession of respondent Eastland in a state courthouse in the State of Mississippi (R. 7).[89]

---

[89] Paragraph 22 of the Complaint states:

"22. In further pursuance of this conspiracy defendants Burbank, Willie and Pfister, at the request of defendants Eastland and Sourwine, secretly and surreptitiously, without warrant or authority of law, transferred a portion of said books, records, documents and other articles belonging to the plaintiffs out of the jurisdiction of the United States District Court for the Eastern District of Louisiana. Plaintiffs had instituted in that Court a proceeding under appropriate federal statutes to obtain the return of said documents and articles, and to receive appropriate redress under the law for the illegal acts of the defendant conspirators. In order to evade the jurisdiction of that Court, the defendants caused to be transferred a portion of the said documents, records and other articles to the District of Columbia. Upon information and belief said documents, articles and records are presently in the possession of defendants Eastland and Sourwine in the District of Columbia. Other documents and records, all belonging to the plaintiffs, illegally and in violation of the Constitution of the United States seized from them, were also secretly and surreptitiously transferred to a State Court House in the State of Mississippi, and are presently in the possession of defendant Eastland."

(b) The Court of Appeals does not rest its affirmance upon the jurisdictional grounds invoked by the District Court. Instead it bases its approval of the dismissal of the equitable cause of action purely upon its conclusion that the equitable relief sought against the individual respondents would not be effective since other "members of the Subcommittee would still have unfettered use of the documents" (R. 104). This portion of the opinion of the lower court is based upon an assumption that although the complaint probably adequately states a cause of action for equitable relief against the individual respondents,[90] it should be dismissed because the relief sought, although otherwise valid, may have been frustrated by subsequent actions of the respondents in turning the seized documents over to the Senate Committee. That this assumption was wholly unwarranted is apparent in light of the record before the District Court at the time of dismissal. The fact that the seized materials, first removed at midnight on the evening before a federal court hearing out of the reach of the jurisdiction of the federal court, then deposited in the sanctuary of a Mississippi Chancery Clerk's office safe from the process of the Eastern District of Louisiana, were now allegedly in the Washington offices of the Internal Security Subcommittee of the Senate, was hardly a reason to assume that an injunction permanently restraining the individual respondents from using the fruits of the illegal raids and seizures would be "of no benefit to the plaintiffs" (R. 105).

The lower court relied upon this Court's statement in *Virginia Ry.* v. *System Federation* No. 40, 300 U.S. 515, 550 (1937) that "A court of equity may refuse to give any relief when it is apparent that that which it can give will not be

---

[90] It would be difficult indeed to hold that the complaint did not state a cause of action for equitable relief against the individual respondents in view of this Court's holding in *Dombrowski* that the allegations there stated a cause of action under Title 42 U. S. C. 1983. 380 U. S. at 490.

effective or of no benefit to the plaintiff." What the lower court did not mention was that in *Virginia Ry.* this Court *upheld* the granting of equity relief pointing out that "whether the decree will prove so useless as to lead a court to refuse to give it, is a matter of judgment to be exercised with reference to the special circumstances of each case rather than to general rules which at most are but guides to the exercise of discretion" 300 U.S. at 551. It is perfectly clear that under the principles of *Virginia Ry.* this "exercise of discretion" can be engaged in only after a hearing on the facts of "the special circumstances of each case" 300 U.S. 551.[91]

Accordingly, at a minimum, petitioners were entitled to a hearing on their complaint at which time the respondents' defense of futility to the plea for equitable relief could have been tested. See *Virginia Ry.* v. *System Federation, supra.* Among the many issues petitioners were entitled to litigate would have been the highly pertinent question as to whether the individual respondents retained copies of the seized documents, particularly the membership lists illegally taken, and whether they had given these copies to other individuals throughout the country. At this moment petitioners can only speculate as to where these copies, admittedly made by respondents, are now located. This Court is well aware of the use sought to be made of membership lists of civil

---

[91] Respondents rely upon the decisions of this Court in *Williams* v. *Fanning,* 332 U. S. 490, and *Blackmar* v. *Guerre,* 342 U. S. 512, to support their contention that "the injunction directed to respondents would have been ineffective". Brief for Respondents in Opposition, p. 9. Neither case is relevant here. In *Williams* v. *Fanning,* the Court granted the relief holding that where "the decree which is entered will effectively grant the relief desired by expending itself on the . . . official who is before the Court," the decree should issue. 332 U. S. at 494. See, also, *Hynes* v. *Grimes Packing Co.,* 337 U. S. 86 (1948). In *Blackmar* v. *Guerre* the relief sought was not proper since the defendant sued had no power at all to give any of the relief sought, clearly not the situation here.

rights organizations in certain areas of the southern states. See *Gibson* v. *Florida Legislative Committee; NAACP* v. *Alabama; NAACP* v. *Flowers; Louisiana* v. *NAACP*, all *supra*. Since the decision of the Court in *NAACP* v. *Alabama* it has become increasingly clear that enforced production of membership lists of civil rights organizations active in the southern states itself violates the Constitution. The complaint charges that a central purpose of the conspiracy was to utilize the Louisiana laws as a pretext for the staging of raids during which the membership lists could be seized—lists not otherwise obtainable to the Southern authorities through lawful legislative process, state or national. As this Court has pointed out, the demand for these membership lists has "a deterrent and 'chilling' effect on the free exercise of constitutionally enshrined rights of free speech, expression and association." *Gibson* v. *Florida Legislative Committee*, 372 U. S. 557. And the serious nature of the "chilling" effect caused by the knowledge that the SCEF lists of names were in the hands of respondents Eastland and Sourwine must be evaluated in light of the warning words of this Court in *Gibson*:

> "What we recently said in *NAACP* v. *Button*, *supra*, with respect to the State of Virginia is, as appears from the record, equally applicable here: 'We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community . . .' 371 U. S., at 435." [at p. 557]

To sanction the dismissal of the equity provisions of the complaint on the ground that the actions of the respondents had, in effect, frustrated any possibility of legal relief, would be to lend judicial approval to the extraordinary course of events set off by the October raids. The Louisiana state court could not order the return of the seized materials when it quashed the original arrest warrants because it was told by the state participants in the conspiracy that

the seized materials were technically not in their hands but under the control of the respondents. The Louisiana federal court to which the petitioners then turned for relief could not order the materials returned because they were spirited out of its jurisdiction by these respondents the night before the hearing on a temporary restraining order, into the sanctuary of a Mississippi Chancery Clerk's office, safely across the Louisiana border. And when federal process finally caught up with the respondents in the District of Columbia in the form of this action, petitioners were faced with the final frustration of any legal recourse—the conclusion of the lower court that petitioners were too late since respondents had safely deposited the illegally obtained material in hands supposedly beyond the reach of the law.[92]

The peremptory dismissal of the equitable cause of action legitimates a course of conduct designed to frustrate any effort to invoke the processes of law, state and federal to protect these petitioners from the harmful effect of raids and seizures both Louisiana courts and this Court have condemned as unlawful.[93]

---

[92] The entire story of this unsuccessful legal pursuit of the illegally seized materials is set forth in the Statement of Facts and Point Three, *supra*.

[93] It also frustrates the mandate and decree of this Court. In *Dombrowski*, the Court ordered the District Court to frame a decree providing for the immediate return of all papers and documents seized. The reinstatement of the equitable cause of action in this case would permit the enforcement of the decree of this Court in respect to these individual respondents since, by their own admissions, copies of all seized materials were made.

Conclusion

This case has brought to the Court a series of questions which in a certain sense touch the fundamentals of a free society. Ultimately they raise the issue of whether in a government of ordered liberty it can be said that any man, by virtue of his power, his status or his high authority, is wholly above the law.

In this case a United States Senator and his assistant stand before the Court charged with participating together with officials of a state in a conspiracy to utilize laws of that state to procure the false arrest of citizens, to contrive illegal raids upon their homes and offices, and searches and seizures of their records and property in open violation of the Fourth Amendment. The conspiracy they stand charged with being parties to had as its purpose the intimidation and deterring of citizens from exercising fundamental rights of speech, press and association in their efforts to implement the constitutional promise of racial equality and justice. The laws of the United States provide remedies against such conduct. The Civil Rights Acts were designed for this very purpose. This Court must now decide whether the remedies the law provides are to be denied these petitioners because the respondents are men whose status places them beyond the reach of law. The Speech or Debate Clause with its roots deep in the history of the strivings of a people for liberty, requires no such result.

This case calls for the response this Court has always given when rank and status have been asserted as a shield to protect the powerful from processes of law invoked to protect the liberties of a citizen. In the first days of the Republic this Court said, in *Marbury* v. *Madison*, that "the Government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws

furnish no remedy for the violation of a vested legal right". In reversing the judgments below, and in requiring these respondents to stand trial on the charges here made, this Court would be reaffirming these words.

The judgments below should be reversed.

Respectfully submitted,

ARTHUR KINOY,
WILLIAM M. KUNSTLER,
511 Fifth Avenue,
New York, New York,

MILTON E. BRENER,
1304 National Bank of
Commerce Building,
New Orleans, Louisiana,

Attorneys for Petitioners.

APPENDIX A

Constitutional and Statutory Provisions Relied On

ARTICLE I, SECTION 6

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 42 USC 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

TITLE 42 USC 1985, SECTION 3

If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein

do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

APPENDIX

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

SECTION B

No. 183 459

Vic. R.S. 14:360

STATE OF LOUISIANA

against

JAMES A. DOMBROWSKI

JUDGMENT

On January 29, 1964 the Orleans Parish Grand Jury found a True Bill against the defendant, charging said defendant with violating Revised Statute 14:360. On March 5, 1964 the defendant, through his counsel of record, filed a Motion for Prayer for Oyer and a Motion to Suppress the evidence. Hearing was had on the Motion to Suppress on March 23, 1964 and at the conclusion of the presentation of evidence and brief argument by both the State and the Defense, the matter was continued as an open matter for purposes of filing briefs. Briefs were received by the Court from both the State and Defense at which time the matter was taken under advisement. At the same time, the time of the presentation of the briefs, counsel for defendant filed a Plea of Res Judicata and, accordingly this, too, was taken under advisement. On May 28, 1964 the State, through the Assistant District

Attorney, filed its Answer to the Plea of Res Judicata and other memoranda in support of their positions. The matter was then set for further argument on June 9, 1964.

As to the Plea of Res Judicata counsel for defense cites to the Court that this Matter Case No. 181 975 of Section E of the Criminal District Court for the Parish of Orleans involving the same defendant, and the same Search Warrants here involved, found that the State witnesses "obviously have not justified the arrest . . ." and ". . . since there has not been a prima facie case made against these three defendants and, therefore discharges them without date." (Transcript of the record.)

Counsel for defendant points out that since they found the [sic] Arrest Warrants of the defendant was found to be illegal then, necessarily, the Search Warrants, issued concurrently with the Arrest Warrants, and upon the same application, are also illegal and Pleads Res Judicata, citing to the Court the recent decision of the Supreme Court of Louisiana in the case of State v. Latil, 92 So. 2, 63; and quoting other decisions. The State, in its argument, admits the hearing in Section E of this Court, admits the determination as regards the validity of the arrest warrant, but denies that there was a determination of the identical, factual and legal issues were involved.

This Court must accept the argument of the defendant and reject that of the State.

On the question of the suppression of the evidence, both the defense and the State have presented this Court with lengthy arguments and briefs. Needless to say, the historic Mapp v. Ohio (367 U. S. 643, 81 S. Ct. 1686, 1961) was cited to the Court by the defendant, along with many, many other citations. Further, in the matter of Marcus, et al. v. The Search Warrant of Property, etc., 367 U. S. 717 the Court found that the authorities in seizing more property than that which was specifically declared in the

warrant acted illegally. This is particularly what took place in this matter presently before this Court; even to the extent that the State has offered to return to the defendant all of the material which they do not consider contraband.

The Court feels that *at least* in view of the two cases cited supra, not to mention other grounds, that the State exceeded its authority in carrying out this search and seizure, and accordingly,

It is ORDERED, ADJUDGED and DECREED that the Motion to Suppress and the Plea of Res Adjudicata herein filed be and the same are hereby Maintained.

JUDGMENT READ, RENDERED and SIGNED IN OPEN COURT THIS 12th day of JUNE 1964.

/s/ George P. Platt
GEORGE P. PLATT,
Judge, Section B.

Clerk's Office, June 15, 1964.
A TRUE COPY

GEO. SMITH, *Deputy Clerk,*
Criminal District Court,
Parish of Orleans.

APPENDIX C

Minute Entry
April 20, 1964
AINSWORTH, J.

No. 13967

CIVIL ACTION

DIVISION D

JAMES A. DOMBROWSKI, *et al.*,

versus

COLONEL THOMAS D. BURBANK, *et al.*

This matter came on for hearing on a former day on motion of defendant, James H. Pfister, to dismiss or, in the alternative, for summary judgment. The court, having heard the argument of counsel and having considered the briefs, affidavits and deposition in support thereof, is now ready to rule.

IT IS ORDERED that motion of defendant, James H. Pfister, to dismiss be, and the same is hereby, DENIED.

REASONS

Mover, a member of the Louisiana Legislature is entitled to absolute immunity under the doctrine of *Tenney* v. *Brandhove*, 341 U. S. 367, 71 S. Ct. 783 (1951), if the affidavits and deposition submitted by the parties indicate that he was acting at the time "in the sphere of legitimate legisla-

tive activity." Here there is a sharp dispute as to the facts upon which we can conclude whether or not the defendant was engaged in permissible legislative activity on the dates when he is alleged to have committed tortious acts against plaintiff. As was said in *Tenney*, supra, "The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive. The present case does not present such a situation." The United States Supreme Court decision was therefore predicated upon the state of facts which it found in the *Tenney* case. Since there is a genuine issue as to material facts, summary judgment is not permissible under Rule 56 of the Federal Rules of Civil Procedure. See National Screen Service Corp. v. Poster Exchange, Inc., 5 Cir. 1962, 305 F. 2d 647. A full trial on the merits is necessary to determine the respective rights of the parties. We express no opinion now as to the facts, beyond stating that they are vigorously disputed between the involved parties.

APPENDIX D

Minute Entry
March 18, 1965
AINSWORTH, J.

No. 13967

CIVIL ACTION

DIVISION D

JAMES A. DOMBROWSKI, *et al.*,

versus

COLONEL THOMAS D. BURBANK, *et al.*

This matter came on for hearing on a former day on motions of defendant, James H. Pfister, to dismiss the complaint against him and for summary judgment in his favor and, alternatively, for an order as authorized by 28 U. S. C. § 1292(b).

The Court, having heard the argument of counsel and having considered the affidavits, deposition and briefs in support thereof and opposed thereto, is now ready to rule.

IT IS ORDERED that the motions of defendant, James H. Pfister, to dismiss the complaint against him and for summary judgment in his favor be, and the same are hereby, DENIED.

IT IS FURTHER ORDERED that the alternative motion for an order as authorized by 28 U. S. C. § 1292(b) be, and the same is hereby, GRANTED.

Appendix D

REASONS

By our minute entry dated April 20, 1964, we denied the motion of defendant, James H. Pfister, to dismiss or, in the alternative, for summary judgment. This motion is a renewal thereof and is denied for substantially the same reasons as are contained in our former ruling. There is no disagreement between the Court and mover as to the law of the case. It is found in *Tenney* v. *Brandhove*, 341 U. S. 367, 71 S. Ct. 783 (1951), where the Court held that a member of a State legislature was entitled to immunity from suit for damages, under the particular facts there submitted. The Supreme Court in *Tenney* said:

> "The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive. The present case does not present such a situation."

As we said in our prior decision, *Tenney* was decided by the Court upon the state of facts which it found, that is, that the complained of acts of the legislator were deemed to be fairly within the province of the Committee's inquiry and, therefore, immune to suit for damages. Here that question is disputed in the most vigorous manner by opposing affidavits submitted by the plaintiff and the deposition of defendant Pfister. In *Norton* v. *McShane*, 5 Cir., 1964, 332 F. 2d 855, the Court granted immunity to certain federal officials growing out of the Ole Miss confrontation because the affidavits submitted by respondents were uncontroverted. That is not true here. Not only are they controverted, but the credibility of the statements of defendant

Pfister is also contested by plaintiff. As was said in plaintiff's memorandum in opposition to the present motions, "This overlooks the significant fact that whereas the affidavits of third party defendants are not controverted, the affidavit of defendant Pfister concerning his lack of participation in the tortious acts complained of *is very much controverted* by his own public statements on the date of the raid, October 4, 1963, to public, press, radio and T.V." Then plaintiff refers to his own affidavit filed herein in March, 1964, in which he attached a transcript of an interview of Mr. Pfister over New Orleans Station WDSU-TV and in which plaintiff alleges that Mr. Pfister made the following statement:

> "Today's operation has been done jointly by the Louisiana State Police and the New Orleans Police Department at our request. This has been a combined operation of substantial complexity and we are very must in debt to these fine police agencies for their splendid work and their splendid cooperation. We particularly commend them for the very efficient and professional manner in which they have handled the mechanics of their raid and the delicate problems arising therefrom. Today's raids have been on the offices and homes of certain key figures and key officers and members of the Southern Conference Educational Fund who have been actively, and probably under Louisiana statutes, illegally, operating a Communist front organization here in the City of New Orleans. The evidence seized in the raids may be subpoenaed by our committee. The federal authorities have taken no official action against this Communist front group despite two separate Congressional committee hearings on its activities. It appears that there is a definite need for legislative action on the state level to cope with

such organizations. The Southern Conference Educational Fund has been operating openly in New Orleans for many years to the intense disgust of most decent citizens who know what the organization really is. Under the guise and the sham of the racial issue, many good and well meaning people have been duped into supporting this Communist-led group. It appears that a substantial amount of material has been obtained. It will take some time for it to be carefully evaluated. The committee plans to hold open hearings on this subject matter in the future. Our committee counsel, Jack N. Rogers, and our committee staff director, Col. Frederick C. Alexander, Jr., both of Baton Rouge, deserve much credit for the extensive investigation and the very intensive planning which necessarily preceded this operation. All of the members of our committee have unanimously concurred in the operations which took place today."

In plaintiff's memorandum of March 1, 1965, he said:

> "In addition, a deposition of Judge Thomas Brahney, recently dismissed by Pfister as a third party defendant, likewise *tends to cast some doubt* on Mr. Pfister's allegation that he knew nothing of the raid prior to the occurrence."

It is clear that plaintiff is attacking the credibility of Mr. Pfister. Whether he has a right to do so can only be determined after a trial of this material issue which is so strongly contested between these two parties. We are unable to do so on the motions before us because a trial court should not on a motion for summary judgment attempt to determine questions of credibility. *Girard* v. *Gill*, 4 Cir., 1958, 261 F. 2d 695; *Blenke Brothers Co.* v.

Ford Motor Company, D. C., N. D. Ind., 1963, 217 F. Supp. 459; *Holdeen* v. *United States*, D. C., S. D. N. Y., 1960, 186 F. Supp. 76; *Buren* v. *Schein*, D. C., E. D. N. Y., 1963, 32 F. R. D. 218; and summary judgment is usually not possible in a conspiracy case such as is alleged here. *Deterjet Corp.* v. *United Aircraft Corp.*, D. C., D. Del., 1962, 211 F. Supp. 348. A summary judgment should only be given when it is quite clear what the truth is, *Koepfle* v. *Garavaglia*, 6 Cir., 1952, 200 F. 2d 191, and should never be entered except where the defendant is entitled to its allowance *beyond all doubt*. *Mitchell* v. *Pilgrim Holiness Church Corp.*, 7 Cir., 1954, 210 F. 2d 879. In passing upon such a motion it is no part of the Court's function to decide issues of fact but solely to determine whether there are issues of fact to be tried. *Hoffman* v. *Babbitt Bros. Trading Co.*, 9 Cir., 1953, 203 F. 2d 636. The standard in passing on a motion for summary judgment is *strict* and it should be granted only when it is *perfectly clear* that no issue of fact is involved. *Clarke* v. *Montgomery Ward & Company*, 4 Cir., 1962, 298 F. 2d 346. It is an *extreme remedy* and should be granted only when the facts are quite clear and any doubt must be resolved against movant. *Gunther* v. *San Diego & Arizona Eastern Railway Co.*, D. C., S. D. Cal., 1961, 192 F. Supp. 882. Where there is the *slightest* doubt as to the facts, the motion should be denied *Dale Hilton, Inc.* v. *Triangle Publications, Inc.*, D. C., S. D. N. Y., 1961, 27 F. R. D. 468. In order for the Court to issue a summary judgment there must be no disputed questions of fact or conflicting inferences to be drawn from undisputed facts which, if settled against the moving party, would allow the plaintiff to recover. *Sheets* v. *Burman*, 5 Cir., 1963, 322 F. 2d 277.

We emphasize that what we say here and what was said in our April 20, 1964 minute entry evidences no opinion by the Court as to the facts involved. The facts are ma-

terial, however, and though the determination as set forth in *Tenney* is narrow because the issue is whether the complained of acts of defendant Pfister may fairly be deemed within the province of the Legislative Committee's inquiry and it must be obvious that there was a usurpation of functions, the present state of the record leaves us no alternative but to deny the motion for summary judgment.

The alternative motion for an order under 28 U.S.C. § 1292(b) is more complicated. Respondent argues that he has an *absolute* immunity under the *Tenney* rule from a suit for damages for acts done in his capacity as a State legislator because he contends that his deposition and the affidavits show that the complained of acts should "fairly be deemed within the province" of the Legislative Committee's inquiry, of which he was Chairman; and as was said in *McShane*, he was acting within the "outer perimeter" of his line of duty as Chairman of the Legislative Committee. We do not read *Tenney* as granting an absolute immunity from all acts of a State legislator. It is our belief that the law of the *Tenney* case requires an examination of the facts to see if the legislator's acts may "fairly be deemed within the province" of legislative activity. Respondent reads McShane also as granting immunity because respondent contends that the deposition and affidavits conclusively show that his acts as a State legislator were within the "outer perimeter" of his line of duty as Chairman of the Legislative Committee. There is involved, therefore, a controlling question of law as to whether there is an absolute legislative immunity under the circumstances here. The difficulty is that the circumstances are disputed and we do not think it possible to resolve them without a trial on the merits. However, the record indicates that respondent Pfister will appeal from our recent dismissal of his third-party complaint against his co-legislator members of the Legislative Committee. We signed a final judgment

in that matter pursuant to Rule 54(b), and the judgment is appealable. In the interest of judicial economy we have granted an order for an interlocutory appeal here in order that the question of law contended for by respondent Pfister may be determined. However, by doing so we do not in any way change our belief that summary judgment is not possible under the circumstances of the record here. A consideration of the appeal from our judgment dismissing Pfister's third-party complaint against his co-legislators will necessarily involve the same issue of law as was raised on the present motions. Thus the granting of an immediate appeal from our present order may materially advance the ultimate termination of the litigation.

APPENDIX E

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22562

JAMES H. PFISTER,

Appellant,

versus

WILLIE P. ARCENEAUX, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

(November 14, 1966.)

Before BROWN, BURGER,* and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: The complaint filed in this action is a by-product of *Dombrowski* v. *Pfister*.[1] Dombrowski grew out of two incidents: (1) an investigation of the Southern Conference Educational Fund by the Louisiana Joint Legislative Committee on Un-American Activities; (2) seizure of the Fund's records and papers and the arrest of several of the Fund's officers following the in-

---

* Of the District of Columbia Circuit, sitting by designation.

[1] 380 U. S. 479, 85 S.Ct. 116, 14 L.Ed.2d 22 (1965), *reversing* 227 F. Supp. 556 (E.D.La. 1964).

vestigation. The complaint alleges that the investigation and the raid were part of a conspiracy to deprive them of their constitutional rights in violation of 42 U.S.C. §§ 1981, 1983, and 1985(3). The plaintiffs ask for preventive relief and damages against a number of defendants, including James H. Pfister, the Chairman of the Joint Committee. Pfister filed a third-party complaint against the other members of the Joint Committee, alleging that they were liable to him for all or part of any sum the plaintiffs might recover from him. His theory of the case is that any of his actions giving rise to liability to the plaintiffs were authorized and approved by the entire committee. Both Pfister, in his answer and in a motion for summary judgment, and the third party defendants, in their motions to dismiss and for a summary judgment, raise the defense of legislative immunity. See *United States* v. *Johnson*, 1966, U.S. , S.Ct. , 15 L.Ed.2d 683; *Tenney* v. *Brandhove*, 1951, 341 U. S. 367, 71 S.Ct. 783, 95 L. Ed. 1019. The district judge denied Pfister's motion, but granted the third party defendants' motion for summary judgment. This appeal questions only the judgment in favor of the third party defendants.[2] We reverse.

This case requires that we scrutinize closely the events leading to the summary judgment in favor of the third party defendants. Pfister filed his third party complaint October 1, 1964. December 30, 1964, the third party defendants filed their answer and motion to dismiss, based on the theory of legislative immunity. January 18, 1965, Pfister filed a paper captioned "Opposition . . . to Motions of Third-Party Defendants . . . To Dismiss". The last para-

[2] Both before and after the summary judgment in favor of the other members of the committee, Pfister moved for summary judgment. The denial of these motions is not before the Court at this time. For this reason Pfister's theory that what is sauce for the goose is likewise for the gander is not applicable.

graph of this paper expressly incorporated "in support of said opposition . . . . all of the pleadings, affidavits, depositions, judgments, and minute entries heretofore filed in these proceedings". Ten days later, the third party defendants filed a motion for summary judgment and introduced the affidavits of all of the members of the committee. Although the motion set forth no theory on which the committee members were entitled to summary judgment, the affidavits indicate that the theory was, once again, legislative immunity. March 15, 1965, the district judge granted the summary judgment. In his amended "Reasons" the district judge stated:

> The affidavits show that the activities of third-party defendants were at all times limited to investigating the activities of plaintiffs and to authorizing the Chairman of the Committee [Pfister] to turn over to the District Attorney for the Parish of Orleans the evidence heretofore found as a result of such investigations. [¶] There is no evidence by countervailing affidavit or otherwise of participation by any of the third-party defendants in any of the tortious acts alleged by plaintiffs, nor of any knowledge thereof.

While it is true that Pfister filed no opposition to the motion for summary judgment, he did oppose the preliminary motion to dismiss, and in his "Opposition" incorporated all of the affidavits previously introduced in the case. We have concluded, therefore, that Pfister's "Opposition" to the motion to dismiss should be treated as a response to the motion for summary judgment. The third party defendants' motion to dismiss was incorporated in their answer, and therefore may not be viewed as a motion under Rule 12(b) of the Federal Rules of Civil Procedure. Rule 12(b) provides that any defenses presented by motion

"shall be made before pleading . . .". The motion must, therefore, be taken as a motion for judgment on the pleadings. In this view, the motion to dismiss assumes a very close relationship to the motion for summary judgment. Rule 12(c) provides that a motion for judgment on the pleadings may be treated as a motion for summary judgment when matters outside the pleadings are introduced. Here the motion for summary judgment set forth no ground upon which it should be granted, but was merely a vehicle for the filing of affidavits to support the motion to dismiss and to convert *that motion* into a motion for summary judgment under Rule 12(c). Absent the legal terminology, the motion for summary judgment and the motion to dismiss were very nearly the same thing.

Since Pfister had opposed the motion to dismiss when it was originally filed,[3] there was no reason for him to renew his opposition when the motion reappeared in the form of a motion for summary judgment. Because he had incorporated all of the preceding affidavits, depositions, judgments, and minute entries in his original answer to the motion to dismiss, there was no need for him to file additional material to meet the affidavits of the third party defendants. He was not resting "upon the mere allegations or denials of his pleading",[4] but was relying on the affidavits and other material incorporated in his "Opposition" to the original motion to dismiss. Although it would have been more artful pleading for Pfister to have reintroduced all this material, to require him to do so at the risk of a summary judgment would lead only to a wasteful duplication.

---

[3] The district judge did not rule on the motion to dismiss until after the motion for summary judgment and the affidavits had been filed. He then disposed of both motions together.

[4] Fed. R. Civ. Pro. 56(e).

We hold, treating Pfister's "Opposition" as a response to the motion for summary judgment, that the district judge erred in granting the motion.

Among the affidavits incorporated to Pfister's "Opposition" was an affidavit introduced by the plaintiff, James A. Dombrowski. In it Dombrowski declared upon oath that on the day of the raid Pfister made a statement to the press in which he described the purpose and method of carrying out the investigation and said, "All of the members of the committee have unanimously concurred in the operation which took place today." If Pfister did make such a statement, the truth or falsity of the statement will bear on the accuracy of the committee members' affidavits that they did not authorize the raids and in fact knew nothing of them before they were carried out. Resolution of this issue, ie, whether Pfister made such a statement and whether it was accurate has a serious bearing on the question whether Pfister and the other members of the committee were "acting in the sphere of *legitimate* legislative activity",[5] which would entitle them to immunity.[6]

Dombrowski's affidavit and the affidavits of the committee members create a "genuine issue as to . . . [a] material fact." Fed. R. Civ. Pro. 56(c). In such circumstances, summary judgment is not proper. "The moving party has the burden of positively and clearly demonstrating that there is no genuine issue of fact and any doubt as to the existence of such an issue is resolved against him." *National Screen Serv. Corp.* v. *Poster Exchange, Inc.*, 5 Cir. 1962, 305 F. 2d 647, 651; *accord, Poller* v. *Columbia Broadcasting System, Inc.*, 1962, 368 U. S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458.

---

[5] Tenney v. Brandhove, 1951, 341 U. S. 367, 376, 71 S.Ct. 783, 95 L. Ed. 1019, 1927. (Emphasis added.)

[6] The district judge relied on this issue of fact and its materiality in denying Pfister's second motion for summary judgment.

Appendix E

Since the affidavits introduced by Pfister in his "Opposition" to the motion to dismiss and those of the other members of the committee raise a genuine issue as to a material fact, the district court's judgment granting the third party defendants' motion for summary judgment must be REVERSED. The case is REMANDED for further proceedings consistent with this opinion.

APPENDIX F

(Affidavit and attachments of Col. Alexander, staff director of Louisiana Joint Committee, filed in *Dombrowski* v. *Burbank* (E.D. La.).

STATE OF LOUISIANA
PARISH OF BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared: Col. Frederick B. Alexander, Jr., who, after being first duly sworn, deposed and said:

That since December 1, 1960, he has served as Staff Director of the Joint Legislative Committee on Un-American Activities, created by the Louisiana Legislature.

That in the early part of 1963 the Southern Conference Educational Fund, and certain of its personnel, came under his official scrutiny as Staff Director of said Committee.

As information concerning the Southern Conference Educational Fund and certain of its personnel came to the attention of Affiant, he discussed the matter with Chairman Pfister and various members of the Committee from time to time as he would see them either in his office at the State Capitol or in New Orleans where he sometimes dropped by to confer with Chairman Pfister.

On August 27, 1963, at a full meeting of the Committee, Affiant briefed the Committee completely on the progress of the investigation which had begun and which had been named "Operation Tiptop". At this Committee meeting Affiant was authorized by the Committee to contact officials of the New Orleans Police Department and fully brief them and to enlist their assistance. A photostat of the official minutes of said meeting is attached hereto.

On September 30, 1963 the Joint Legislative Committee was again briefed on evidence which had been accumulated, the legal aspects of the investigation which was now called

"Project 50" and it was recommended to the Committee that the investigation be put in the hands of the police authorities. Affiant briefed the Committee on the procedures of a police search. By motion unanimously passed, your Affiant and the Committee counsel, Jack Rogers, were authorized to carry through the entire operational plan of the investigation which had been fully explained to the Committee, including full cooperation with the police. The Chairman appointed a sub-committee to be in New Orleans on October 4th and 5th, on call.

A copy of the formal minutes of the Committee in which the above information was laid before it is attached hereto, dated October 1, 1963.

The search and seizure complained of by plaintiffs took place on October 4, 1963.

As shown by the attached minutes, your Affiant was duly authorized by the Joint Legislative Committee to cooperate fully with the police authorities in carrying out the operational plan which had been fully explained to the Committee.

In carrying out the instructions of the Committee Affiant took no steps nor any actions that were not authorized by the Committee or which were not fully covered by the legal mandate to the Committee from the Legislature.

/s/ Frederick B. Alexander, Jr.,
Col., U.S.A., Retired.

(Sworn to and subscribed before me this 23 day of March, 1965.)

/s/ James H. Hughes,

Notary Public.

Appendix F

STATE OF LOUISIANA

JOINT LEGISLATIVE COMMITTEE

ON

UN-AMERICAN ACTIVITIES

Sept. 3, 1963

MINUTES OF COMMITTEE MEETING OF AUGUST 27, 1963:

The following members were present: Chairman Pfister, Representatives Willie P. Arceneaux, Dudley A. Bernard and Mike John, Jr.; Senators Cecil R. Blair, Samuel S. Broussard, Jackson B. Davis and Harold Montgomery, and Staff Director Colonel Alexander.

Chairman Pfister called the meeting to order at 10:15 a. m. in the meeting room at the City Club in Baton Rouge.

Reading of the minutes of the previous meeting were dispensed with.

Colonel Alexander briefed the Committee completely on the progress to date of Operation Tip-Top and asked the Committee's permission to brief Chief of Police Giarrusso of New Orleans and Major Trosclair of the New Orleans Police Department on the operation with the intention of enlisting their assistance since the operation would fall under the jurisdiction of the New Orleans Police force. A motion was made by Senator Broussard and seconded by Representative Bernard that this be done and was unanimously passed by the Committee.

Colonel Alexander briefed the Committee on its financial status, and a motion was made by Representative John and seconded by Senator Montgomery to pay all current bills including the outstanding one to the Isaac Detective

Agency for the month of July. Colonel Alexander pointed out to the Committee that Operation Tip-Top would be an expensive one and that the present method of the Budget Committee in giving the Committee its money on a monthly basis would not provide the Committee with sufficient money for Operation Tip-Top. The Committee authorized Colonel Alexander to contact Mr. James Riley of the Division of Administration to point out these facts to him and to request a lump sum of $2,500.00 be given the Committee immediately in addition to the $2,000.00 currently due the Committee on September 1, 1963.

There being no more business the Committee adjourned at 11:45 a. m.

Frederick B. Alexander, Jr.
FREDERICK B. ALEXANDER, JR.
Colonel USA (Ret.)
Staff Director

FBA/L

Appendix F

STATE OF LOUISIANA

JOINT LEGISLATIVE COMMITTEE

ON

UN-AMERICAN ACTIVITIES

Oct. 1, 1963

MINUTES OF COMMITTEE MEETING OF SEPTEMBER 30, 1963 AT 4022 SOUTH RAMSEY DRIVE, BATON ROUGE, LOUISIANA:

The following members were present: Chairman Pfister, Representatives Dudley A. Bernard, Mike John, Jr., and Wolborn Jack; Senators Samuel S. Broussard, Cecil R. Blair and Harold Montgomery; Counsel Rogers and Staff Director Col. Alexander.

Chairman Pfister called the meeting to order at 6:30 p.m.

Counsel Rogers briefed the Committee on all legal aspects of Project 50 (SCEF) with the recommendation that the matter be turned over to the police.

Col. Alexander briefed the Committee on all mechanical operations of the Project 50 (SCEF) investigation.

A motion was made by Rep. Mike John, Jr., and seconded by Representative Dudley Bernard that Col. Alexander and Counsel Rogers be authorized to carry through the entire operational plan of the Project 50 (SCEF) investigation, including full cooperation with the police, as outlined at the meeting. The motion was passed unanimously.

Chairman Pfister appointed a sub-committee to be in New Orleans on October 4 and 5 on call—the committee to

consist of Chairman Pfister, Rep. Mike John, Jr., and Rep. Dudley Bernard.

Chairman Pfister called for a meeting of the entire Committee to be held in the Committee office at 10:00 a.m. on October 8.

There being no further business the meeting was adjourned.

FREDERICK B. ALEXANDER, JR.,
Frederick B. Alexander, Jr.,
Colonel USA (Ret.)
Staff Director.

FBA/L